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No. 80-900
IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JOINT APPENDIX.

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APPEAL DOCKETED DECEMBER 17, 1980.
PROBABLE JURISDICTION NOTED MARCH 9, 1981.

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JOINT APPENDIX

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Chronological List of Relevant Docket Entries.

March 3, 1976	Plaintiff's First Amended Complaint filed.
May 14, 1976	Defendant's Answer to First Amended Complaint as Modified filed.
July 2, 1976	Affidavits of Pedro Luis Ybarra, Ricardo Bohorquez, and Jose Chavez-Salido filed.
February 3, 1977	Opinion of three-Judge Court filed.
February 14, 1977	Proposed Partial Judgment filed.
February 23, 1977	Partial Judgment and Order entered on behalf of plaintiffs and against defendants.
July 6, 1978	Order of mandate from U.S. Supreme Court filed and spread. The plaintiffs' request for further discovery on the issue of probation officer's duties denied. Plaintiffs relieved from prior agreement adjuring liability against defendant County under 42 USC § 1983.
June 4, 1980	Opinion of three-judge court filed.
August 15, 1980	Final judgment of three-judge court filed.
August 19, 1980	Final judgment of three-judge court entered and parties notified.

October 20, 1980	**Defendants file notice of appeal to U.S. Supreme Court from judgment entered on August 19, 1980.**

First Amended Complaint.

United States District Court Central District of California.

Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra, Plaintiffs, vs. Clarence E. Cabell, in his official capacity as Acting Chief Probation Officer of Los Angeles County; Jacqueline Hasenstab, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; Gordon T. Nesvig, in his official capacity as Chief Personnel Officer for the County of Los Angeles, and the County of Los Angeles, a body politic. Defendants. Civil Action Civ. No. 76-0541 IH.

Plaintiffs amend their complaint as of course pursuant to the provisions of Rule 15(a) of the Federal Rules of Civil Procedure as follows:

INTRODUCTORY STATEMENT

1. This is a civil action brought pursuant to 42 U.S.C. Sections 1981 and 1983 seeking declaratory and injunctive relief enjoining the enforcement of California Government Code Section 1031(a) which unconstitutionally discriminates against Plaintiffs solely on the basis of their alienage. Plaintiffs contend that Section 1031(a), which requires United States citizenship as a prerequisite for employment as a peace officer, violates the Equal Protection Clause of the United States Constitution; that it unlawfully infringes upon the constitutional right to travel; that the regulation of resident aliens has been preempted by Congress; and that the statute is overborne by the Supremacy Clause of the Constitution.

2. Plaintiffs further seek a preliminary and permanent injunction (1) enjoining Defendants from maintaining a policy and practice of withholding or interferring with the rights of Plaintiffs to employment as peace officers because of

their status as aliens; and (3) requiring Defendants to provide equitable relief to Plaintiffs and members of their class in the form of back pay and seniority benefits.

JURISDICTION

3. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1343(3) which grants district courts original jurisdiction over any action which seeks to redress the deprivation, under color of state law, of any rights, privileges or immunities secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of any persons within the jurisdiction of the United States; and by 28 U.S.C. Section 1331, which grants district courts jurisdiction over civil actions arising under the Constitution or laws of the United States when the matter in controversy exceeds $10,000. This matter in controversy exceeds $10,000, exclusive of interest and costs.

4. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure which relate respectively to declaratory judgments and injunctive relief.

5. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2281 and 2284 in that Plaintiffs seek an injunction to restrain Defendants, public officials, from the enforcement, operation and execution of a state statute on the grounds that said statute is contrary to the constitution of the United States.

PLAINTIFFS

6. Plaintiff JOSE CHAVEZ-SALIDO is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff CHAVEZ-SALIDO was born in Juarez, Mexico on May 25, 1949. Plaintiff

CHAVEZ-SALIDO has been a permanent legal resident of these United States since 1955.

7. Plaintiff RICARDO BOHORQUEZ is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff BOHORQUEZ was born in the Republic of Columbia on February 8, 1938. Plaintiff BOHORQUEZ has been a permanent legal resident of these United States since 1961.

8. Plaintiff PEDRO LUIS YBARRA is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff YBARRA was born in Lacabe, Spain on June 21, 1938. Plaintiff YBARRA has been a permanent legal resident of these United States since 1972.

CLASS ACTION

9. Plaintiffs bring this action on their own behalf and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all lawfully admitted resident aliens who have been and/or will be denied employment by Defendants in peace officer positions, including but not limited to deputy probation officers, solely on the basis of thier alien status. Members of the class on behalf of whom Plaintiffs sue are so numerous that joinder of all members is impractical. However, there are common questions of law and fact affecting the right of all lawfully admitted resident aliens to be free from discrimination in employment based upon alienage. The claims of the Plaintiffs are typical of the claims of the class, and Plaintiffs will fairly and adequately represent the interests of the class. In addition, the Defendants have acted on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

DEFENDANTS

10. Defendant CLARENCE E. CABELL is, at this time, the Acting Chief Probation Officer for the County of Los Angeles and, as such, is the Chief Administrative Officer for the Probation Department and is ultimately responsible for all administrative decisions made within that Department, including those decisions which relate to the employment of new Deputy Probation Officers.

11. Defendant JACQUELINE HASENSTAB is, and at all times relevant hereto has been, the Personnel Officer for the Los Angeles County Probation Department and, as such, is initially responsible for all personnel decisions made within the Probation Department, including those decisions which relate to the employment of new Deputy Probation Officers.

12. Defendant GORDON T. NESVIG is, and at all times relevant hereto has been, the Chief Personnel Officer for the County of Los Angeles and, as such, is ultimately responsible for all personnel policies and decisions made for the County of Los Angeles, including those decisions which relate to the employment of persons in peace officer positions.

13. Defendant COUNTY OF LOS ANGELES, is, and at all times relevant hereto has been, a governmental entity duly organized and existing under and by virtue of the laws of the State of California.

STATEMENT OF FACTS

14. California Government Code Section 1031 provides, in relevant part:

> "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:
>
> (a) Be a citizen of the United States."

15. California Penal Code Section 830.5 declares that, by law, deputy probation officers are peace officers for the State of California. Pursuant to these statutes, Defendants have established as a continuing policy and practice the requirement of United States citizenship as a condition for employment in any peace officer position, including the position of deputy probation officer.

Facts as to Plaintiff CHAVEZ-SALIDO:

16. On March 25, 1975, Plaintiff CHAVEZ-SALIDO filed an application for employment with the County of Los Angeles for the peace officer position of "Deputy Probation Officer II, Spanish-speaking". In April of 1975, Plaintiff CHAVEZ-SALIDO took the oral examination for the above-described position. Plaintiff CHAVEZ-SALIDO subsequently received a score of 95 on the examination and was placed on the eligibility list for Deputy Probation Officer II, Spanish-speaking. Plaintiff CHAVEZ-SALIDO was thereafter notified by Defendants of a job opening. On or about September 8, 1975, Plaintiff was advised by Mr. John Terao in the Personnel Office of the Probation Department that he would have to present proof of United States citizenship prior to receiving his appointment as a Deputy Probation Officer. Since Plaintiff is a resident alien, he was unable to produce the requisite proof and was therefore unable to satisfy this eligibility requirement. As a result, Plaintiff was denied employment in the peace officer position of Deputy Probation Officer II, Spanish-speaking by the County of Los Angeles solely on the basis of his alien status.

17. In October of 1975, Plaintiff CHAVEZ-SALIDO filed an application with the Los Angeles County Probation Department for the position of Deputy Probation Officer-Trainee. Thereafter, Plaintiff CHAVEZ-SALIDO took the

oral examination for this position and scored 100. In November of 1975, Plaintiff was contacted by Defendants and informed of a job opening for Deputy Probation Officer Trainee. Plaintiff was informed that as a condition of such employment he would have to file an application for a Petition for Naturalization with the United States Immigration and Naturalization Service (INS) or certify that such an application had previously been filed with the INS. Plaintiff was further informed that upon completion of a six month training program he would either have to be a United States citizen or he would be terminated automatically. A copy of these employment conditions is attached hereto as Exhibit "A" and by this reference is made a part hereof as though set forth in full. Plaintiff CHAVEZ-SALIDO presently has a Petition for Naturalization pending with the INS and was therefore able to accept employment as Deputy Probation Officer-Trainee. Said employment commenced on or about December 1, 1975, and unless Plaintiff CHAVEZ-SALIDO is a United States citizen by May 1, 1976, he will be terminated from his employment with the Los Angeles County Probation Department.

Facts as to Plaintiff BOHORQUEZ:

18. In January of 1975, Plaintiff BOHORQUEZ filed an application for employment with the County of Los Angeles for the peace officer position of "Deputy Probation Officer II, Spanish-speaking". On May 5, 1975, Plaintiff BOHORQUEZ took the oral examination for the above-described position. At the conclusion of the examination there was an extended discussion regarding plaintiff's non-citizen status. During the course of this discussion Plaintiff BOHORQUEZ was informed that he could not be appointed to the deputy probation officer position because he was not a United States citizen. Plaintiff was further informed that

his alien status was a major obstacle to his employment but that the position could be held open pending clarification by Defendants. On or about May 10, 1975, Plaintiff BOHORQUEZ received notification by mail from the Los Angeles County Department of Personnel that he had failed to achieve the passing score of 70 for his oral examination. Plaintiff BOHORQUEZ was therefore not placed on the eligibility list for said position and was thereby eliminated from further consideration. Plaintiff BOHORQUEZ is informed and believes, and on that basis alleges, that Defendants underscored his examination on the basis of his alien status.

Facts as to Plaintiff YBARRA:

19. In September of 1974, Plaintiff YBARRA filed applications and took oral examinations for the following peace officer positions with Los Angeles County: Deputy Probation Officer II, Deputy Probation Officer I, and Deputy Probation Officer-Trainee. On or about October 29, 1974, Plaintiff YBARRA received notification by mail from Defendants that he had passed the examination for Deputy Probation Officer II with a score of 70; the examination for Deputy Probation Officer I with a revised score of 80; and the examination for Deputy Probation Officer-Trainee with a score of 88. Plaintiff YBARRA was subsequently placed on the eligibility lists for all three positions.

20. On or about January 19, 1975, Plaintiff YBARRA received notification from the Defendants of a job opening for the position of Deputy Probation Officer II. Plaintiff YBARRA immediately met with Mr. John Terao in the Personnel Office of the Probation Department and was advised that although the Deputy Probation Officer II positions were no longer available, Plaintiff YBARRA was qualified for one of the Deputy Probation Officer I positions. Plaintiff

YBARRA was further informed by Mr. Terao that he would have to present proof of United States citizenship prior to receiving his appointment as a Deputy Probation Officer. Plaintiff YBARRA was unable to submit the required proof of citizenship and was thereafter denied employment as a peace officer by Defendants solely on the basis of his alien status.

CLAIM FOR RELIEF

21. The conduct of the Defendants in enforcing California Government Code Section 1031(a) denies to Plaintiffs and to all other persons similarly situated the full and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. Sections 1981 and 1983 in that it arbitrarily discriminates against Plaintiffs, under the color of law, solely on the basis of their status as aliens. Plaintiffs further allege that California Government Code Section 1031(a) unconstitutionally restricts the right of Plaintiffs to engage in interstate travel as guaranteed by a pneumbra of provisions of the United States Constitution and that said section violates the Supremacy Clause in that it conflicts with the comprehensive regulatory scheme for immigration and naturalization as enacted by the United States Congress.

IRREPARABLE HARM

22. Plaintiffs have no plain, adequate, or complete remedy at law to redress the wrongs alleged, and this suit for injunctive and declaratory relief is their only means of securing adequate relief. Plaintiffs are now suffering, and will continue to suffer, irreparable injury as a result of the operation of California Government Code Section 1031(a) as implemented by Defendants' refusal to hire non-citizens unless the operation of said statute and the conduct of Defendants' is enjoined by this Court.

ACTUAL CONTROVERSY

23. An actual and present controversy exists between the parties hereto which is in need of immediate resolution. Plaintiffs contend that Defendants' enforcement of California Government Code Section 1031(a) violates their right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and to the full and equal benefit of all laws as guaranteed by 42 U.S.C. Sections 1981 and 1983. Plaintiffs further contend that Defendants' actions as herein described violate their constitutional right to unabridged interstate travel and that the enforcement of said statute illegally encroaches upon an area of federal regulation in violation of the Supremacy Clause of the United States Constitution. Defendants contend in all respects to the contrary.

WHEREFORE, Plaintiffs pray that this Court:

1. Assume jurisdiction of this case.

2. Convene a three judge court pursuant to U.S.C. Sections 2281 and 2284.

3. Enter an order that this is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

4. Preliminarily and permanently enjoin Defendants from continuing and maintaining any policy or practice of requiring United States citizenship as a condition for employment in any peace officer position including, but not limited to, that of deputy probation officer.

5. Preliminarily and permanently enjoin the operation of California Government Code Section 1031(a).

6. Grant Plaintiff CHAVEZ-SALIDO injunctive relief by ordering his immediate appointment as a peace officer in the position of "Deputy Probation Officer II, Spanish-speaking" with the Los Angeles County Probation Depart-

ment and awarding Plaintiff appropriate back pay and seniority benefits.

7. Grant Plaintiff BOHORQUEZ injunctive relief by ordering Defendants to grant him a new employment examination for the peace officer position of Deputy Probation Officer II.

8. Grant Plaintiff YBARRA injunctive relief by ordering his immediate appointment as a peace officer in the position of Deputy Probation Officer I with the County of Los Angeles and awarding Plaintiff appropriate back pay and seniority benefits.

9. Enter a final judgment declaring that California Government Code Section 1031(a) is null and void as violative of the Constitution of the United States and 42 U.S.C. Sections 1981 and 1983.

10. Enter final judgment awarding to members of the class appropriate equitable relief in the form of back pay.

11. Award to Plaintiffs reasonable attorneys' fees, to be paid directly to their attorneys, and their costs of suit.

12. Award such further relief as the Court deems just and proper.

DATED: March 3, 1976.

DANIEL M. LUEVANO
ROSALYN M. CHAPMAN
JOHN McDERMOTT
RICHARD A. PAEZ
MICHELE WASHINGTON
ELENA H. ACKEL
By /s/ Richard A. Paez
RICHARD A. PAEZ
By /s/ Michele Washington
MICHELE WASHINGTON
Attorneys for Plaintiffs

EXHIBIT "A"

I hereby certify that I have been advised of the following conditions of employment as a Probation Trainee with the Los Angeles County Probation Department:

1) Eligibility to file an APPLICATION TO FILE PETITION FOR NATURALIZATION with the Immigration and Naturalization Service.

— OR —

2) Previous filing of an APPLICATION TO FILE PETITION FOR NATURALIZATION with the Immigration and Naturalization Service.

I also certify that I have been advised that, upon completion of the training program for Probation Trainees, I must be a U.S. citizen or be subject to termination as a Probation Trainee.

_____ _____

SIGNATURE DATE

Defendants' Answer to First Complaint as Modified.

In the United States District Court, Central District of California.

Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra, Plaintiffs, v. Clarence E. Cabell, et al., Defendants. Case No. CV-76-0541-IH.

Filed on May 14, 1976.

On April 23, 1976, plaintiffs and defendants agreed to strike certain portions of plaintiffs' first amended complaint. This Court subsequently approved such modification by order dated April 23, 1976.

Defendants hereby submit their answers to said first amended complaint as follows.

I.

Defendants deny each and every allegation specified in paragraphs 1, 2, 21 and 22 of the complaint.

II.

In answering paragraph 3 of the complaint, defendants admit jurisdiction is conferred upon this court by 28 U.S.C. Section 1343(3), but deny jurisdiction is conferred upon this court by 28 U.S.C. Section 1331.

III.

Defendants admit the allegations contained in paragraphs 4, 5, 13, 14, 15, 16, 19, 20 and 23 of the complaint.

IV.

Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6, 7, and 8 of the complaint.

V.

In answering paragraph 10 of the complaint, defendants admit that defendant Clarence E. Cabell was at the time the first amended complaint was filed the Acting Chief Probation Officer for the County of Los Angeles. Defendants further admit the Chief Probation Officer is the Chief Administrative Officer for the Probation Department and is ultimately responsible for all administrative decisions made within that department. Defendants deny the Chief Probation Officer has ultimate responsibility for all decisions relating to the employment of new deputy probation officers.

VI.

In answering paragraph 11 of the amended complaint, defendants admit that defendant Jacquelyn Hasenstab is the Personnel Officer for the Los Angeles County Probation Department. Defendants deny Jacqualyn Hasenstab has authority to make personnel decisions relating to the employment of new deputy probation officers.

VII.

In answering paragraph 12 of the amended complaint, defendants admit defendant Gordon T. Nesvig was, at the time this first amended complaint was filed, the Chief Personnel Officer for the County of Los Angeles. Defendants deny the Chief Personnel Officer for the County of Los Angeles has ultimate responsibility for all personnel practices and decisions made for the County of Los Angeles including those decisions which relate to the employment of persons in peace officer positions.

VIII.

In answering paragraph 17 of the first amended complaint, defendants deny that plainitff Chavez-Salido will be terminated from his employment with the Los Angeles

County Probation Department by May 1, 1976. Defendants admit the balance of the allegations contained in paragraph 17 of the complaint.

IX.

In answering paragraph 18 of the first amended complaint, defendants deny that plaintiff Bohorquez had his examination underscored on the basis of his alien status. Defendants admit the balance of the allegations contained in paragraph 18 of the complaint.

FIRST DEFENSE

A public entity is not a "person" under the Federal Civil Rights Act.

SECOND DEFENSE

Defendants acted at all times in good faith and with the reasonable belief their actions were valid.

THIRD DEFENSE

There is no imputed liability between public officers in actions under the Federal Civil Rights Act.

FOURTH DEFENSE

There is no imputed liability between a public officer and his employing public entity in actions under the Federal Civil Rights Act.

FIFTH DEFENSE

There are legitimate state interests underlying California Government Code Section 1031 and California Penal Code Section 830.5.

SIXTH DEFENSE

There are compelling state reasons underlying and justifying California Government Code Section 1031 and California Penal Code Section 830.5.

SEVENTH DEFENSE

Plaintiffs have a constitutionally protected right to employment as a peace officer.

EIGHTH DEFENSE

Defendants have the right to establish reasonable qualifications as conditions for public employment, especially peace officer positions.

WHEREFORE, defendants respectfully pray as follows:

1. Plaintiffs take nothing by this action.

2. That this court refrain from issuing any preliminary or permanent injunctive relief regarding defendants' policies or practices of employment of peace officers including deputy probation officers.

3. That this court enter a final judgment upholding the constitutionality of California Government Code Section 1031(a).

4. That this court deny any award to plaintiffs of reasonable attorney's fees to be paid directly to plaintiffs' attorneys or for costs in maintaining this suit.

5. That defendants recover their costs in defending this action.

6. For such other and further relief as to this Court seems just and proper.

DATED: May 14, 1976

Respectfully submitted,
JOHN H. LARSON
County Counsel
By /s/ Philip H. Hickok
PHILIP H. HICKOK
Deputy County Counsel
Attorneys for Defendants

Joint Stipulation of Facts; Factual and Legal Issues to Be Tried.

United States District Court Central District of California.

Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Civil Action Civ. No. 76-0541 IH.

I.

JOINT STIPULATION OF FACTS

1. This action arises under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1983. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3) and (4) which grant district courts original jurisdiction over any action which seeks to redress deprivation, under color of state law, of any rights, privileges or immunities secured by the Constitution of the United States.

2. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2281 and 2284.

3. California Government Code Section 1031 provides, in relevant part:

> "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:
>
> (a) Be a citizen of the United States."

4. California Penal Code Section 830.5 declares that, by law, probation officers and deputy probation officers are peace officers.

5. California Welfare and Institutions Code section 1076 declares that the officers and employees of each institution for delinquents shall have the power and authority of peace officers listed in Section 830.5 of the Penal Code.

6. California Welfare and Institutions Code Section 6778 declares that every counselor, assistant counselor, and

deputy counselor in mental health shall have the powers of a peace officer.

7. Pursuant to the above enumerated California statutory provisions, defendants have established as a continuing policy and practice the requirement of United States citizenship as a condition for employment in any peace officer position for the County of Los Angeles, including the positions of probation officers, parole officers, mental health counselors and officers and employees in institutions for delinquents.

8. Plaintiff JOSE CHAVEZ-SALIDO is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff CHAVEZ-SALIDO was born in Juarez, Mexico on May 25, 1949, and has been a permanent legal resident of the United States since 1955. Plaintiff CHAVEZ-SALIDO'S Alien Registration Receipt Number is A8-991-817.

9. Plaintiff CHAVEZ-SALIDO attended Santa Fe High School in Los Angeles County, and thereafter graduated from California State College at Long Beach in August, 1975, with a Bachelor of Arts degree in Mexican-American Studies.

10. On March 27, 1975, plaintiff CHAVEZ-SALIDO applied to the Los Angeles County Department of Personnel for the position of Deputy Probation Officer II, Spanish-speaking. At the time he submitted his application he indicated on the application form that he was not an American citizen; upon filing the application plaintiff CHAVEZ-SALIDO showed his alien registration card to the clerk.

11. On May 1, 1975, plaintiff CHAVEZ-SALIDO took the oral examination for Deputy Probation Officer II, Spanish-speaking. Approximately two weeks later he received a notice from the Los Angeles County Department of Per-

sonnel that he had scored 95 on the examination and that his name was being placed upon the upcoming eligibility list for the position of Deputy Probation Officer II, Spanish-speaking.

12. In September of 1975, plaintiff CHAVEZ-SALIDO was notified by Los Angeles County of a job opening as Deputy Probation Officer II, Spanish-speaking at a monthly salary of $1,185.00. On or about September 8, 1975, plaintiff met with Mr. John Terao in the Personnel Office of the Probation Department. At that time he was advised by Mr. Terao that he would be required to show proof of: (1) a college degree and (2) United States citizenship, prior to receiving his appointment as a probation officer. Plaintiff CHAVEZ-SALIDO was unable to produce the requisite proof of citizenship.

13. Plaintiff CHAVEZ-SALIDO was thereafter advised by Mr. Terao that it was the policy of Los Angeles County that all probation officers be United States citizens at the time of their appointment. Plaintiff was informed that, due to this policy, the Probation Department would not be able to offer him employment in the position of Deputy Probation II, Spanish-speaking. Plaintiff CHAVEZ-SALIDO was thereby denied employment with the County of Los Angeles soley upon the basis of his alien status.

14. On September 11, 1975, plaintiff CHAVEZ-SALIDO filed an application with the Los Angeles County Probation Department for the position of Deputy Probation Officer Trainee at a monthly salary of $842.45. On the same day, plaintiff CHAVEZ-SALIDO took the oral examination for this position and received a score of 100.

15. On November 27, 1975, plaintiff CHAVEZ-SALIDO was contacted by Ms. Monica Smith of the Los Angeles County Probation Department and was informed that he was

eligible for a job opening as Deputy Probation Officer Trainee. Plaintiff was further informed by Ms. Smith that as a condition of such employment he would have to file a Petition for Naturalization with the United States Immigration Service (INS) or certify that such an application had previously been filed with the INS. Plaintiff was also informed that upon completion of a six month training period he would either have to be a United States citizen or he would be subject to termination. Plaintiff CHAVEZ-SALIDO at that time had a Petition for Naturalization pending with the INS and was therefore able to accept the conditional employment as a Deputy Probation Officer Trainee.

16. Plaintiff CHAVEZ-SALIDO commenced employment with the Los Angeles County Probation Department as a Deputy Probation Officer Trainee on or about December 1, 1975 at a monthly salary of $842.45. As of this date there has been no change in the salary scale for Deputy Probation Officer Trainee or Deputy Probation Officer II.

17. On or about March 15, 1976, plaintiff CHAVEZ-SALIDO became a United States citizen.

18. The position of Deputy Probation Officer Trainee does not require deputization as a "peace officer."

19. Plaintiff PEDRO LUIS YBARRA is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff YBARRA was born in Lacabe, Spain on June 21, 1938, and has been a permanent legal resident of the United States since 1972. His Alien Registration Receipt number is A19-906-241.

20. Plaintiff YBARRA graduated from Camillas University, Spain in June of 1960 with a Bachelor of Arts degree in Theology. Plaintiff graduated from the University of California at Los Angeles with a Masters of Arts degree in African Studies in June of 1970. Plaintiff YBARRA is

currently working towards the completion of a second Master of Arts degree in Sociology at Cal State University at Northridge.

21. On August 22, 1975 plaintiff YBARRA applied for the position of Deputy Probation Officer Trainee and on September 3, 1975 he took the examination for that position.

On August 22, 1975 he also applied for the position of Deputy Probation Officer II, and on November 6, 1975 he took the examination for that position. Finally on October 8, 1975 plaintiff YBARRA applied for and on that same day took the examination for Deputy Probation Officer Trainee.

22. On September 10, 1975, plaintiff YBARRA received notification by mail that he had scored 88 on the Deputy Probation Officer Trainee Examination. On or about November 11, 1975, he received notification, by mail that he had passed the examination for Deputy Probation Officer II with a score of 70. On October 6, 1975, he received notification that he had achieved a score of 80 on the Deputy Probation Officer II examination. Plaintiff YBARRA was subsequently placed on the eligibility lists for all three positions.

23. On or about January 19, 1976, plaintiff YBARRA received notification from the Personnel office of the Los Angeles County Probation Department of a job opening as Deputy Probation Officer II. Plaintiff thereafter immediately met with Mr. John Terao in the Personnel office of the Probation Department and was advised that although the Deputy Probation Officer II positions were no longer available, Plaintiff was qualified for one of the Deputy Probation Officer I positions.

24. Plaintiff YBARRA indicated to Mr. Terao that he would accept the Probation Officer I position, whereupon

Mr. Terao requested that Plaintiff present his college degree and proof of United States citizenship in order to qualify for appointment as a deputy probation officer. Plaintiff YBARRA, a resident alien was unable to comply with the citizenship requirement. Plaintiff YBARRA was thereafter denied employment with Los Angeles County solely upon the basis of his alien status.

25. The starting salary for a Deputy Probation Officer I, in January 1976, was $1,002.18 per month. As of this date, there has been no change in the salary scale for Deputy Probation Officer I.

26. Plaintiff RICHARDO BOHORQUEZ is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff BOHORQUEZ was born in the Republic of Columbia on February 8, 1938, and has been a permanent legal resident of the United States since 1961. His Alien Registration Receipt Number is A-13-052-095.

27. Plaintiff BOHORQUEZ graduated from the University of California at Los Angeles with a Bachelor of Arts degree in Latin American Studies in March of 1975.

28. In January of 1975, plaintiff BOHORQUEZ filed an application for employment with the County of Los Angeles for the peace officer position of Deputy Probation Officer II, Spanish-speaking.

29. On May 5, 1975, plaintiff BOHORQUEZ was interviewed in an oral examination by Mr. Edward Martinez and Mr. Raul Solis. At the conclusion of the examination there was an extended discussion regarding plaintiff's non-citizen status. Plaintiff was advised by Mr. Solis that despite his score on the oral interview he would not be able to receive an appointment as a deputy probation officer because

he was not a United States citizen and therefore could not be deputized as a peace officer.

30. On or about May 10, 1975, plaintiff BOHORQUEZ received notification by mail from the Personnel Office of the Los Angeles County Probation Department that he had failed to achieve the passing score of 70 for his oral examination. Plaintiff was further informed by the Personnel Department that it would be useless to appeal the examination results because there is a Los Angeles County policy which prohibited the appointment of non-citizens to deputy probation officer positions.

31. Plaintiff BOHORQUEZ was eliminated from further consideration for employment as a Deputy Probation Officer because of the low score which he received in the oral employment examination.

32. Plaintiff BOHORQUEZ is desirious of gaining employment as a deputy probation officer with the County of Los Angeles. As a result of the citizenship requirement, plaintiff BOHORQUEZ has refrained from filing any further applications for deputy probation officer or any other peace officer position with the County of Los Angeles.

33. Pursuant to 42 U.S.C. §§ 1981 and 1983 Plaintiffs CHAVEZ-SALIDO, YBARRA and BOHORQUEZ seek declaratory and injunctive relief enjoining the enforcement of California Government Code § 1031 (a) and the consequent policy and practice of defendants of requiring as a condition of employment in peace officer positions that the applicant for said position be a United States citizen.

34. Defendant CLARENCE E. CABELL, was at the time of filing of the First Amended Complaint the Acting Chief Probation Officer for the County of Los Angeles and as such was the Chief Administrative Officer for the Probation Department and is ultimately responsible for all ad-

ministrative decisions made within that Department. Since the filing of the First Amended Complaint, KENNETH FARE has succeeded to the position of Chief Probation Officer for the County of Los Angeles.

35. Defendant JACQUELINE HASENSTAB is, and at all times relevant hereto has been, the Personnel Officer for the Los Angeles County Probation Department.

36. Defendant GORDIN T. NESVIG was, and at the time of filing of the First Amended Complaint the Chief Personnel Officer for the County of Los Angeles. Since the filing of the First Amended Complaint, has succeeded to the position of Chief Personnel Officer for the County of Los Angeles.

37. Defendant COUNTY OF LOS ANGELES is, and at all times relevant hereto has been a governmental entity duly organized and existing under and by virtue of the laws of the State of California. Plaintiffs do not seek any relief directly against the County under 42 U.S.C. § 1983.

38. At all times relevant hereto Defendants were acting under color of State law.

II
ISSUES OF FACT AND LAW TO BE TRIED

Because most of the issues in this case remaining to be tried are combinations of fact and law, it is appropriate to state factual and legal issues together. The factual and legal issues to be tried in this case are as follows:

1. Whether jurisdiction is proper under 28 U.S.C. § 1331.

2. Whether California Government Code Section 1031 (a) denies lawful resident aliens equal protection of the laws

as guaranteed by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sections 1981 and 1983.

3. Whether there is any compelling state interest which justifies the requirement of citizenship as a condition of employment as a peace officer.

4. Whether there is any rational basis for the citizenship requirement.

5. Whether California Government Code Section 1031 (a) unlawfully infringes upon the constitutional right to travel.

6. Whether California Government Code Section 1031 (a) infringes upon the power of Congress to regulate aliens and is therefore violative of the Supremacy Clause of the U.S. Constitution.

7. Whether there is imputed liability between public officers in action under the Federal Civil Rights Acts.

8. Whether there is imputed liability between a public officer and his employing public entity in actions under the Federal Civil Rights Acts.

9. Whether plaintiffs have a constitutionally protected right to employment as a peace officer.

10. What relief should be granted should the Court find that California Government Code section 1031 (a) and the consequent policy of defendants is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sections 1981 and 1983. Relevant to this issue are the following sub-issues:

A. Whether the County of Los Angeles is a proper defendant under 42 U.S.C. § 1981.

B. Whether the County of Los Angeles is a proper defendant in a claim for relief based on the Fourteenth Amendment to the United States Constitution.

C. Whether Plaintiffs CHAVEZ-SALIDO and YBARRA are entitled to a monetary award for loss of pay and appointment, retroactively to the date of rejection, to the positions for which they applied but were denied solely because they were not United States citizens.

D. If the answer to the sub paragraph immediately above is in the affirmative what should be the amount of the monetary award for each plaintiff.

E. Whether this action is moot as to plaintiff CHAVEZ-SALIDO.

F. What efforts if any have been made to obtain other employment, including other government employment.

G. If employment has been obtained to what extent should their wages be off set against any judgment awarded in this case.

H. Whether plaintiff BOHORQUEZ' oral examination was prejudiced by the discussion concerning his alien status. If so, whether he is entitled to retake the examination, and be restored, retroactively, to the eligibility list for the May, 1976 examination.

I. Whether defendant County officials acted in good faith with the reasonable belief that their actions were valid and whether said conduct may bar the recovery of lost pay and appointment to the positions to which plaintiffs applied but were rejected.

J. Whether or not the prevailing parties in this action are entitled to an award of costs; if so, the amount of such costs.

DATED: June 4, 1976

DANIEL M. LUEVANO
ROSALYN M. CHAPMAN
JOHN E. McDERMOTT
RICHARD A. PAEZ
MICHELLE WASHINGTON
ELENA H. ACKEL

By: /s/ Richard A. Paez
RICHARD A. PAEZ
Michelle Washington
MICHELLE WASHINGTON
Attorneys for Plaintiffs

DATED: June 4, 1976

JOHN H. LARSON
County Counsel
PHILIP H. HICKOK
Deputy County Counsel
By: Philip H. Hickok
PHILIP H. HICKOK

Affidavit of Jose Chavez-Salido.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Civil Action, Civ. No. 76-0541-IH, (Three-Judge Ct.: JWC & SNB).

State of California, County of Los Angeles — ss.

Filed on July 2, 1976.

I, JOSE CHAVEZ-SALIDO, being first duly sworn, depose and say:

1. On September 8, 1975, I was denied employment as a Deputy Probation Officer II Spanish-Speaking by the Los Angeles County Probation Department solely because I was not a United States citizen. At that time, I was unemployed and had been seeking work for several months.

2. Between September 8, 1975 and the time I was hired by the Los Angeles County Probation Department as a Deputy Probation Officer Trainee in late November, 1975, I sought employment with numerous public and private employers. Among others, I applied for the following positions: (1) Eligibility Worker I with the Los Angeles County Department of Public Social Services; (2) Community Services Coordinator with the Los Angeles County Department of Mental Health; (3) Employment Counselor with the California Employment Development Department; (4) Job Developer, Equal Employment Opportunities Representative and Counselor, all of which were positions with the Rio Hondo Area Community Action Council; (5) as a laborer with Stauffers Chemical, Inc.; and (6) as a Deputy Probation Officer Trainee with the Los Angeles County Probation Department. All of my efforts to seek employment, with the exception of the Deputy Probation Officer Trainee position, during this period, were unsuccessful.

3. During the same period, I attempted to collect unemployment insurance benefits but the California Employment Development Department informed me that I was ineligible for unemployment insurance because I did not satisfy the prior earnings requirement.

4. On November 27, 1975, I was hired by the Los Angeles County Probation Department as Deputy Probation Officer Trainee at a monthly salary of $852.00. Unlike the DPO II position, the trainee position did not require that I be deputized as a "peace officer" and the position for which I was hired was not a permanent full-time position. The trainee position is funded under the Comprehensive Employment Training Program ("CETA") and its continued existence is dependent upon funding by the federal government. The DPO II-Spanish-Speaking position for which I applied but was rejected, solely because I was not a United States citizen, was a permanent full-time position. Although my salary as a trainee is $852.00 a month, as a CETA employee, I do not receive the same employee benefits as a regular county employee. For example, as a Probation Officer Trainee — CETA, I am ineligible for county life insurance, lay-off benefits, severance pay, unemployment insurance, bilingual pay bonus, promotions, and pay-steps advances. However, as a regular county employee I would be eligible for all of these benefits.

5. I am, at this time, still desirous of obtaining a Deputy Probation Officer II - Spanish-Speaking position. If offered such a position, I would accept it. Furthermore, I have no reservations in subscribing to any loyalty as required by the County of Los Angeles. In fact, at the time I was hired as a Deputy Probation Officer Trainee, I was required to subscribe to the County's loyalty oath.

DATED: June 30, 1976

/s/ Jose Chavez-Salido
JOSE CHAVEZ-SALIDO
Affiant

Subscribed and sworn to before
me on this 30th day of June, 1976.

/s/ Danie J. Kinsey
NOTARY PUBLIC FOR THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

Affidavit of
Pedro Luis Ybarra.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Civil Action, Civ. No. 76-0541-IH, (Three-Judge Ct.: JWC & SNB).

State of California County of Los Angeles — ss.

Filed on July 2, 1976.

I, JOSE LUIS YBARRA, being first duly sworn, depose and say:

At the time I was denied employment with the County of Los Angeles Probation Department as a Deputy Probation Officer, Spanish-Speaking, I was employed by the Housing Authority of the City of Los Angeles as an Eligibility and Occupancy Interviewer at a monthly salary of $889.00. I am presently employed in the same capacity but my salary has increased, as of February 1, 1976 to $911.00 per month.

Although presently employed, I am very anxious to obtain employment as a Deputy Probation Officer with the Los Angeles County Probation Department and if offered a position, I would accept it. Furthermore, even though I am not a United States citizen at this time and do not have a petition for naturalization pending before INS, I have no hesitation and would willingly sign and subscribe to any loyalty oath required by the County of Los Angeles.

DATED: 7-2-76, 1976

/s/ Pedro Luis Ybarra
PEDRO LUIS YBARRA
Affiant

Subscribed and sworn to before me
on this 2nd day of June, 1976.

/s/ W. Kenneth Rice
NOTARY PUBLIC FOR THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

Affidavit of Ricardo Bohorquez.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Class Action, Civ. No. 76-0541-IH, (Three-Judge Ct.: JWC & SNB).

State of California County of Los Angeles — ss.

Filed on July 2, 1976.

I, RICARDO BOHORQUEZ, being first duly sworn, depose and say:

1. On or about January 15, 1975, I filed an application with Los Angeles County for employment as Deputy Probation Officer II, Spanish-Speaking.

2. On or about May 5, 1975, I was interviewed in an oral examination by Mr. Ed Martinez and Mr. Raul Solis. During the course of the examination I was asked questions pertinent to the duties of a Deputy Probation Officer II which I answered accurately since I had been working in that type of a job situation under a salaried work-study program as well as on a voluntary basis.

3. At the conclusion of the examination Mr. Solis stated that there would be a problem in deputizing me for the position because I was not a United States citizen. After a lengthy discussion of the matter, both Mr. Solis and Mr. Martinez concluded that United States citizenship was a requirement for the position for which I was being interviewed.

4. Immediately prior to leaving the examination room I asked Mr. Solis whether there was a practical solution to this problem regarding any citizenship status. He replied that the position I had applied for could possibly be held open until the matter was clarified.

5. On or about May 10, 1975, I received a notice from the Los Angeles County Probation Department that I had failed to achieve a passing score for the oral examination. The passing score was 70 and I received a score of 65.

6. At the time that I received notification of the examination results I was working as a voluntary probation aid at the Los Compadres facility. My supervisor, Mr. Ernest Gonzales, telephoned the Los Angeles County Personnel Department and was informed that one of the reasons for my low score was my non-citizen status.

7. I thereafter requested information regarding the process for appealing my examination results. Mr. Gonzales and I were then informed by the Personnel Department that it would be useless to appeal the results because there was a general County policy which prohibited the appointment of non-citizens to deputy probation officer positions.

8. Since I was denied employment as a Deputy Probation Officer, I have not been able to secure permanent full-time work. During this time I received unemployment insurance compensation from the California State Department of Employment Development. In total, I received unemployment compensation for 36 weeks at the rate of $45.00 per week.

10. Even though I presently do not have a Petition for Naturalization pending before the Immigration and Naturalization Service, I would be willing to sign any loyalty oath which is required by Los Angeles County or the State of California. Once I have secured permanent full-time employment, I intend to petition for naturalization.

Dated this 2nd day of July, 1976.

/s/ Ricardo Bohorquez
RICARDO BOHORQUEZ
Affiant

Subscribed and sworn to before me
this 2nd day of July, 1976.

/s/ Danie J. Kinsey
NOTARY PUBLIC FOR THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

Opinion.

Jose Chavez-Salido et al., Plaintiffs, v. Clarence E. Cabell, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., Defendants. No. CV 76-0541-1H.

United States District Court, C. D. California. Feb. 3, 1977.

Addendum to Opinion March 14, 1977.

Resident aliens, who sought employment as deputy probation officers, brought suit challenging a California statute providing that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. A Three-Judge District Court, Irving Hill, J., held that the statute denied equal protection on its face and as applied to the resident aliens.

Partial judgment for plaintiffs.

Richard A. Paez, Michele Washington, Western Center on Law and Poverty, Inc., Los Angeles, Cal., for plaintiffs.

Philip H. Hickok, Deputy County Counsel, Los Angeles, Cal., for defendants.

Before BARNES, Senior Circuit Judge, CURTIS, Senior District Judge, and IRVING HILL, District Judge.

HILL, District Judge:

In this opinion, in a case of first impression, we declare unconstitutional California Government Code § 1031(a). That section provides that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. The case is brought by three plaintiffs who applied for, and were denied, appointment to the position of Los Angeles County deputy

probation officer solely because of the statutory requirement of American citizenship. Under California Penal Code § 830.5 a deputy probation officer is declared to be a peace officer and is therefore subject to the citizenship requirement of Government Code § 1031(a). We hold § 1031(a) to be both unconstitutional on its face and unconstitutional as applied. We also hold that a county may be held liable for damages in an action brought directly under the 14th Amendment and in an action brought under 42 U.S.C. § 1981.

I.

FACTS.

Plaintiffs, Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County. In a single-count first amended complaint seeking both injunctive relief and damages, they sue Los Angeles County, its Chief Personnel Officer, its Acting Chief Probation Officer and the Personnel Officer of the County's Probation Department.[1] The case was tried without live witnesses. Most of the facts were stipulated to and some additional facts were received by uncontradicted affidavits.

Each of the plaintiffs has applied for appointment to the County Probation Department as a Deputy Probation Officer II. This position carries a salary of $1,185 per month. There are some factual differences in the status of the three plaintiffs and in the treatment accorded their applications.

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[1]Defendant Nesvig has been succeeded as Chief Personnel Officer of the County by Harry L. Hufford. Defendant Cabell has been succeeded as Chief Probation Officer of the County by Kenneth Fare. In both situations the present incumbent has been substituted for his predecessor under Fed.R.Civ.P. 25(d)(1).

Chavez-Salido has resided here as a lawfully admitted permanent resident alien since 1955. His application to become a Deputy Probation Officer II was filed on March 27, 1975. An oral examination is given for this position, with 70 being the minimum passing grade. Chavez-Salido took the examination May 1, 1975, scored 95, and was notified that he was being placed on the eligibility list. In September, 1975, he was notified that a job opening existed. But shortly thereafter he was told he would have to show proof of citizenship to receive an appointment. Being unable to do so, he was denied employment. The denial is stipulated to have been solely the result of the citizenship requirement of Government Code § 1031(a).

The County also has a position called Deputy Probation Officer Trainee, paying substantially less than Deputy Probation Officer II. The Trainee position does not require citizenship since it is not given by law the status or powers of peace officer. Chavez-Salido was offered the Trainee position on December 1, 1975, and accepted it. He had applied for American citizenship well before applying to become a probation officer. His citizenship petition was granted and he was made a citizen on March 15, 1976. However, by that time, his name had been taken off the eligibility list for Deputy Probation Officer II. In August, 1976, he was promoted to the position of Deputy Probation Officer I. The Officer I position pays more than the Trainee position but less than the Officer II position and citizenship is required for it.

Plaintiff Ybarra has been a lawfully admitted permanent resident alien since 1972. On August 22, 1975, he applied for the position of Deputy Probation Officer II. He scored 70 on the examination. On the same date Ybarra also applied for the trainee position. On October 8, 1975, he applied for the position of Deputy Probation Officer I. He passed the

Officer I examination with a score of 80. He was told that he was qualified for both probation officer positions, that there was a job open in the I category, but no job was open in the II category although he would be placed on an eligibility list for the latter. He was also told that for both probation officer positions he was required to present proof of citizenship. Being unable to do so, he was denied the Officer I appointment and a position on the eligibility list for Officer II. It is again stipulated that these denials were solely the result of the statutory citizenship requirement. Ybarra was employed by the Los Angeles City Housing Authority during the entire application and examination period and apparently is still so employed. Ybarra has not to this date applied for American citizenship.

Plaintiff Bohorquez has been a lawfully admitted permanent resident alien since 1961. At the time the case was argued, he had never applied for American citizenship and, so far as we know, has still not done so. His application for the position of Deputy Probation Officer II was filed January, 1975. He was given the oral examination on May 5, 1975 but during the examination was told that he could not receive an appointment to the position sought because of his lack of citizenship. He was subsequently notified that he had failed to achieve a passing score of 70 on the examination. There is a procedure whereby an applicant can appeal his examination results. Bohorquez was notified that because he failed to meet the citizenship qualifications it would be useless to appeal. He therefore did not appeal and has refrained from filing further applications, though he is still desirous of appointment. Bohorquez was unemployed at the time of his application and examination and has remained unemployed since. It appears that he never sought appointment as a Probation Officer Trainee. Whereas Chavez-Salido and Ybarra seek damages by way of

back pay as part of their relief. Bohorquez seeks only the opportunity to take a new examination.

Each plaintiff was at all times willing to take the loyalty oath prescribed in the California Constitution for all public employees. Cal.Const. art. XX, § 3. That oath includes an agreement to support and defend the Federal and State Constitutions.

The first amended complaint, upon which the case was tried,[2] challenges § 1031(a) and the citizenship requirement therein contained, under the equal protection clause of the 14th Amendment and under two provisions of the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1983. These challenges articulate a claim of unlawful discrimination on the basis of alienage. In addition, the complaint asserts that § 1031(a) unconstitutionally infringes upon plaintiffs' right to travel and upon Congress' power to regulate aliens. The latter claim invokes the supremacy clause of the Federal Constitution. Each plaintiff seeks a declaratory judgment invalidating the statute and injunctive relief prohibiting its application to him. All three plaintiffs seek attorneys fees. As stated, two plaintiffs seek money damages.

Plaintiffs requested the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284[3] Defendants agreed that a three-judge court should be convened and the Chief Judge of the Circuit appointed the members of the three-judge

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[2]The first amended complaint was originally drawn as a class action. Before the trial, by stipulation of all parties, an order was entered striking all class action claims and aspects.

[3]During the pendency of the action, Congress enacted new legislation substantially limiting the availability of three-judge courts. The Three-Judge Court Amendments of 1976, Pub.L. No. 94-381, 90 Stat. 1119. The new law by its terms does not apply to actions commenced before its enactment, i.e. August 2, 1976, and thus the instant case was unaffected by the new statute.

court on April 26, 1976.[4] The case was tried and argued August 20, 1976.

II.

JURISDICTION.

The individual defendants do not contest the jurisdiction of this court to entertain the instant action against them. They apparently concur in plaintiffs' assertion that a claim is stated against them which is cognizable under 42 U.S.C. § 1983, with jurisdiction accruing to this Court under 28 U.S.C. § 1343(3). Section 1983 imposes liability on any *person* who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution . . . ." Section 1343(3) grants to the district courts original jurisdiction to redress any deprivation of constitutional rights of the type described in § 1983.

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[4]We are aware, of course, of the teaching of the Supreme Court in *Hagans v. Lavine*, 415 U.S. 528, 95 S.Ct. 1372, 39 L.Ed.2d 577 (1974). *Hagans* holds that before resorting to a three-judge court, the single district judge should exhaust all potentially dispositive claims within his jurisdiction. The claim in the instant case of invalid state intrusion into the federal power to regulate immigration is not based on any alleged conflict between § 1031(a) and any specific federal law or regulation. Plaintiffs refer only generally to the Immigration and Naturalization Act, 8 U.S.C. § 1101 *et seq.* *Hagans* describes a claim that direct conflict between a specific state statute and a specific Congressional enactment renders the state statute "unconstitutional". The opinion in *Hagans* denominates such a conflict claim as "statutory" and differentiates it from a claim of a clearly constitutional nature. *Hagans* holds that the single district judge must decide such a statutory claim before requesting that a three-judge court be convened to consider other claims. The supremacy clause claim of the plaintiffs here, like their other claims of unconstitutionality, derives "exclusively and directly from the Federal Constitution rather than from federal legislation [and] entail[s] an immediate resort to the Constitution . . . ." *Norwick v. Nyquist*, 417 F.Supp. 913, 916 (S.D.N.Y. 1976). All of the claims of the instant plaintiffs are of a clearly constitutional nature. None of the claims is "statutory" in the *Hagans* context. Therefore, in our view, a three-judge court was properly convened.

But Defendant Los Angeles County does contest our jurisdiction. Plaintiffs argue that their complaint states a claim against the County both for violation of their equal protection rights under the 14th Amendment and for violation of 42 U.S.C. § 1981. Section 1981 in relevant part reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ."

Plaintiffs argue that if a claim is stated under either or both of these bases, our jurisdiction over the County derives from 28 U.S.C. § 1331(a), the general grant to the district courts of federal question jurisdiction. Section 1331(a) confers jurisdiction in all civil actions which arise "under the Constitution, laws, or treaties of the United States" and "wherein the matter in controversy exceeds the sum of value of $10,000 . . . ."

Defendant County strongly urges that it, as a political subdivision, is not suable under § 1981. The County unfortunately took no position, either in its brief or in argument, as to plaintiffs' asserted alternative basis of liability, i.e. direct violation of the 14th Amendment. We have examined both bases as well as the question of the existence in the case of the $10,000 amount in controversy requirement under § 1331(a).

We hold that the complaint states a cognizable claim against the County on both 14th Amendment and § 1981 grounds and that the amount in controversy exceeds $10,000. Therefore, we hold that this court has jurisdiction of the claim against the County under § 1331(a).

(A) *The Section 1981 Claim*

It is settled that the right to be free from illegal discrimination in employment is encompassed within the right "to make and enforce contracts" protected by § 1981. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). *Johnson* involved racial discrimination in employment. In *Graham v. Richardson*, 403 U.S. 365, 277, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) the Supreme Court held that aliens are within the class protected by § 1981 and may utilize that section as plaintiffs. *Graham* involved welfare benefits. Although neither the Supreme Court nor our Circuit have spoken on the question of alienage discrimination in employment, the Fifth and Seventh Circuits in carefully considered opinions, and a number of district courts, have held that § 1981 applies to discrimination in employment based on alienage as well as to employment discrimination which is racially based.[5] We choose to follow those holdings.

So we turn to the question of whether an action under § 1981 may be maintained against a political subdivision of a state.

Since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) it has been established law that a political subdivision of a state is immune from a damage claim under § 1983 because it is not a "person". And that im-

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[5]*Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Roberto v. Hartford Ins. Co.*, 177 F.2d 811 (7th Cir. 1949), *cert. denied*, 339 U.S. 920, 70 S.Ct. 622, 94 L.Ed. 1343 (1950); *Spiess v. C. Itoh & Co. (America), Inc.*, 408 F.Supp. 916 (S.D. Tex. 1976); *Hollander v. Sears, Roebuck & Co.*, 392 F.Supp. 90 (D.Conn. 1975); *Mohamed v. Parks*, 352 F.Supp. 581 (D.Mass. 1973); *Lopez v. White Plains Housing Authority*, 355 F.Supp. 1016 (S.D.N.Y. 1972); *League of Academic Women v. Regents of Univ. of Calif.*, 343 F.Supp. 636 (N.D.Cal. 1972). *Cf. Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

munity has been extended to claims for injunctive relief. *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

Since §§ 1981 and 1983 are parts of what is generally called the Civil Rights Acts, it is tempting to argue that a political subdivision's immunity from suit under one section extends to the others. And our Circuit in *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) appears to have accepted that argument, holding that a political subdivision is also not amenable to suit under § 1981. The County's claim that it cannot be sued under § 1981 is founded almost exclusively on *Arunga*.

We have pondered the *Arunga* opinion and in so doing, we have examined the record and the briefs. We believe, with the utmost respect, that *Arunga* may have been insufficiently considered and that it reaches an incorrect result. One district court in this district has previously declined to follow *Arunga*, *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal. 1976), and we do likewise. We also believe that whatever authority *Arunga* has, has been undermined by language in a more recent decision of the Supreme Court.

Arunga was an action brought in *pro. per.* by a black legally admitted resident alien of Kenyan nationality. He sued the City of Alameda and one of its police officers (who was never served) for a claimed physical assault arising out

of an allegedly unlawful arrest.[6] The trial court twice granted thr City's motion to dismiss for lack of jurisdiction. The first grant was with permission to amend, and following submission of an amended complaint, the second dismissal was granted without leave to amend. The appeal followed. In the Court of Appeals the matter was submitted without

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[6]Arunga's papers throughout the record demonstrate that he was both unlearned and confused. The amended complaint is in one count; its jurisdictional paragraph cites only § 1983. A later paragraph merely mentions §§ 1981 and 1985 along with § 1983. The complaint does not mention § 1986 at all. The gravamen of the complaint is a prayer for money damages of $1.5 million dollars as general and exemplary damages for the assault upon plaintiff and his physical and mental suffering. Some of the damages sought for mental suffering are claimed to be for the emotional effect upon plaintiff of his grandfather's premature death resulting from the "humiliation" to plaintiff. Plaintiff denominated his case as a class action and for some obscure reason prayed that a three-judge court be convened for the purpose of declaring unconstitutional Article 11, Section 11 of the California Constitution which confers local police power upon counties and cities.

In the City's original motion to dismiss, the points and authorities supporting it consisted of one sentence which asserted that "a city is not a 'person' under 42 U.S.C. §§ 1981-88". The motion to dismiss the amended complaint was likewise supported by a single sentence argument as follows:

> "Plaintiff's AMENDED PLEADING' adds nothing except jibberish and still fails to state a cause of action against the City." *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968).

Diamond and Brown are both § 1983 cases declaring municipal immunity. The trial court in neither of its dismissal orders cited any authority or stated any reason.

Arunga's brief on appeal does not mention § 1981 and does not even mention the suability of a political subdivision under any of the Civil Rights Acts. His brief is almost entirely devoted to the three-judge court issue and a discussion of state police power. The city's brief on appeal devotes only seven lines to the suability question, as follows:

> "It is clear that a City may not be sued under 42 U.S.C. §§ 1981-85. *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961); *Moor v. Madigan* [458], F.2d [1217] (9th Cir. No. 71-3019; 71-3030, March 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). Under the authorities cited, the District Court was unquestionably correct in dismissing plaintiff's action as to the City."

argument. The opinion is per curiam and in two short paragraphs:

> "The plaintiff filed an action against the City of Alameda alleging that he had been deprived of rights in violation of 42 U.S.C. §§ 1981 and 1986. The complaint was dismissed on motion upon the ground that the city is not a 'person' and cannot be sued under the Civil Rights Act. [sic] An amended pleading based upon the same statute against the same defendant was again dismissed and this appeal taken.
>
> It is abundantly clear that a municipal corporation is not a 'person' subject to suit under 42 U.S.C. 1983. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969). The district court was unquestionably correct and we affirm." (Footnote omitted).

We believe the first sentence of the opinion to be factually incorrect because we cannot find in the amended complaint any claim of a violation of § 1986. The second paragraph of the opinion, which contains the holding, makes what we believe a fundamental error with respect to § 1981, i.e. the assumption that liability is imposed by § 1981 only upon "persons". Whereas § 1983 does use that term defining who is liable, § 1981 does not use the term nor does it limit in any way who may be liable as a defendant for a violation.

It is unfortunate but understandable that the *Arunga* opinion assumes that various of the Civil Rights Acts (42 U.S.C. § 1981 through § 1988) and particularly §§ 1981, 1982 and 1983, should be construed and applied according to common rules and principles. This approach may well result from the fact that all of the substantive Civil Rights Acts were

codified together in 1874 in the Revised Statutes.[7] But it ignores certain other important historical facts: (1) that §§ 1981 and 1982, which are companion sections, were originally enacted in 1866, whereas § 1983 did not become law until 1871[8] and (2) that §§ 1981 and 1982 are derived from, and based upon, the 13th Amendment, whereas § 1983 was enacted to implement the 14th Amendment.[9]

As the Supreme Court points out in *Monroe*, the legislative history of § 1983 and the use of the term "person" therein, preclude its application to political subdivisions. But a careful examination of the legislative history of §§ 1981 and 1982 establishes, we think, with equal clarity, that political subdivisions were intended to be included within their ambit. The legislative history of § 1981 to which we refer has been extensively collated by at least three other district courts. *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill. 1974); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D.Pa. 1974); *League of United Latin American Citizens v. City of Santa Ana, supra*. It serves no useful purpose for us to duplicate or reproduce those discussions; we incorporate them by reference.

The Supreme Court, post-*Arunga*, has said in analyzing § 1982:

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[7]For further discussion of the history of the codification, see *Runyon v. McCrary*, 427 U.S. 160, 168 n. 8, 96 S.Ct. 2586, 2593 n. 8, 49 L.Ed.2d 415 (1976).

[8]With respect to the other parts of what has been called "The Civil Rights Acts", §§ 1987 and 1988 enacted along with §§ 1981 and 1982, in 1866, and § 1986 was adopted with § 1983, as part of the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13. A part of § 1985 was originally enacted in 1861, but the present full § 1985 was also adopted in 1871. Section 1984, which grants no substantive rights, was not enacted until 1875. Act of March 1, 1875, ch. 114, § 5, 18 Stat. 337.

[9]In addition to §§ 1981 and 1982, §§ 1987 and 1988 are also based upon the 13th Amendment while §§ 1985 and 1986, along with § 1983 were enacted pursuant to the 14th Amendment.

> "[L]ike the Amendment upon which it is based, § 1982 is not a 'mere prohibition of State laws establishing and upholding racial discrimination in the sale and rental of property, but rather [is], an 'absolute' bar to all discrimination, private as well as public, federal as well as state." *District of Columbia v. Carter*, 409 U.S. 418, 422, 93 S.Ct. 602, 605, 34 L.Ed.2d 613 (1974).

We read this language as an affirmation that all sources of discrimination, including governmental entities, are reachable under § 1982.

Because they are companion sections, having a common derivation and legislative history, it would appear that what applies to § 1982 applies with equal force to § 1981.[10]

Unfortunately, the Supreme Court has not yet decided the question of whether political subidivisions are suable under § 1981. One circuit and a number of district courts have held, as we hold, that they are.[11] Two district courts outside our Circuit, relying on *Arunga*, have held that they are not.[12] The lack of a definitive Supreme Court decision and the paucity of other authority since *Arunga* probably results from the passage of the 1972 amendments to Title VII of the Civil Rights Act of 1964, making political subdivisions amenable to suit under Title VII for discrimination

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[10] *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 422 n. 78, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Bowers v. Campbell*, 505 F.2d 1155, 1157-58 (9th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979, 993-94 (1973).

[11] *Campbell v. Gadsden County District School Board, supra* note 5; *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal. 1976); *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill. 1974); *Hines v. D'Artois*, 383 F.Supp. 184 (W.D. La. 1974); *Maybanks v. Ingraham* 378 F.Supp. 913 (E.D.Pa. 1974).

[12] *Redding v. Medica*, 402 F.Supp. 1260 W.D.Pa. 1975) *Black Brothers v. City of Richmond*, 386 F.Supp. 147 (E.D.Va. 1974).

in employment.[13] The confusion caused by *Arunga* leads us to the fervent hope that our Circuit will shortly have occasion to take a second look at the legal question decided in it.

(B) *The 14th Amendment Claim*

A claim cognizable in this court is stated against the County under the 14th Amendment. Relatively recent authority makes clear that political subdivisions of states are answerable in the district courts for direct constitutional violations in a complaint seeking injunctive relief, damages or both, despite the absence of any statute specifically creating the cause of action.

In 1971 the Supreme Court held in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) that, without an enabling statute, liability in damages existed for direct constitutional violations with district court jurisdiction being found in § 1331(a). The defendants in *Bivens* were federal FBI agents and the direct constitutional violation alleged was a 4th Amendment violation. No extension of *Bivens* to agents of state or local government was needed since 42 U.S.C. § 1983 provided a specific remedy in the federal courts against them, and 28 U.S.C. § 1343(3) provided clear federal jurisdiction.

Utilizing the Bivens rationale, the Supreme Court later *clearly* implied that an action may be brought in the federal courts against political subdivisions of states for direct constitutional violations including 14th Amendment violations.

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[13]Plaintiffs in our case cannot resort to Title VII because discrimination based on alienage is not included within the types of discrimination prohibited by it. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1974).

City of Kenosha v. Bruno, supra.[14] After twice declining to decide that question[15] our own Circuit has now specifically decided it. Relying on *Kenosha*, the Circuit held that political subdivisions of states may be sued for both damages and equitable relief for constitutional violations, with jurisdiction being provided by § 1331(a). *Gray v. Union County Intermediate Education Department*, 520 F.2d 803, 805 (9th Cir. 1975).[16] *Gray* involved a school district but the court characterized a school district as a "political subdivision" of a state. *Id.*

(C) *Amount In Controversy*

Having determined that a claim "arising under the Constitution" and one also arising "under the laws" of the United States are presented, we have jurisdiction of that

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[14]Plaintiffs were holders of retail store and tavern liquor licenses whose renewal applications had been denied by the two defendant cities under procedures set up by state statute. Alleging that their renewal applications were unconstitutionally denied, they sought injunctive relief including a declaration that the statutes involved were unconstitutional. A three-judge district court held that a claim under § 1983 was properly pled against the cities because only equitable relief was sought, and found jurisdiction under § 1343(3). The Supreme Court reversed the § 1983 holding but remanded the case rather than ordering judgment for the defendant cities. The remand order assumed that jurisdiction might well exist under § 1331(a) if the requisite amount in controversy was shown to exist. Two Justices, in a concurring opinion, viewed the remand as a holding by the Court, for the first time, that jurisdiction existed under § 1331(a) for actions against a city charging direct constitutional violations. See concurring Opinion of Brennan, J., 412 U.S. at 516, 93 S.Ct. 2222.

[15]*Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff'd.*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974).

[16]The Third and Fifth Circuits and other district courts are in accord that direct constitutional causes of action may be maintained against political subdivisions of states. *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976); *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974); *Redding v. Medica*, 402 F.Supp. 1260 (W.D.Pa. 1975); *Williams v. Brown*, 398 F.Supp. 155 (N.D.Ill. 1975); *Maybanks v. Ingraham, supra*, note 11; *Dahl v. Palo Alto*, 372 F.Supp. 647 (N.D.Cal. 1974). But *Cf. Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975) (*en banc*).

claim under § 1331(a) if the "amount in controversy exceeds $10,000."

The amount in controversy must be found to exist under § 1331(a) as to each plaintiff. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). If attention is focused solely on the amount of awardable money damages, one might entertain a substantial doubt about the existence of the requisite $10,000 jurisdictional requirement in this case. No plaintiff pleads money damages in any specific amount. One plaintiff seeks no money damages at all. The other two, who were employed in other positions during the period in question, seek damages consisting of "back pay and seniority benefits". If each of those plaintiffs must offset, by way of mitigation, the wages and benefits earned at other work, it is quite clear that neither could be awarded damages which exceed $10,000.[17]

But it is not proper, in deciding the amount in controversy, to focus solely on the money damage aspect of this case. Equitable relief, by way of injunction, is also sought here. In *Glenwood Light & Water Company v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 S.Ct. 30, 60 L.Ed. 174 (1915), the Court said of injunctive actions:

> ". . . The jurisdictional amount is to be tested by the value of the object to be gained by the complainant." 239 U.S. at 125, 36 S.Ct. at 32.

And of civil rights actions under 28 U.S.C. § 1331, it has been said that the amount in controversy is the value of the

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[17]The difference in pay between the trainee position accepted by Chavez-Salido and the position he now seeks is $333 per month and the period of denial is less than 18 months. As to Ybarra, the evidence indicates that he earned an average of about $900 per month during the denial period in the job at the Housing Authority. For Ybarra, the denial period does not exceed 14 months.

right to be protected. 1 Moore's Federal Practice § 0.96[3.-1] at 939.[18]

Where a case involves denial of employment or dismissal from employment, courts have held that the amount in controversy may be met by considering the value of the job in question, i.e. the amount of money which plaintiff would earn in the job for the indefinite future of for the rest of his work expectancy. *Friedman v. International Association of Machinists*, 95 U.S. App.D.C. 128, 220 F.2d 808, 810 (1955); *Hiss v. Hampton*, 338 F.Supp. 1141, 1146 (D.D.C. 1972): *White v. Bloomberg*, 345 F.Supp. 133, 141 (D.Md. 1972). We adopt that rule and under it, the case of each plaintiff amply meets the $10,000 amount in controversy requirement. The value of the position of Deputy Probation Officer II, which is the "object to be gained" by the complaint, exceeds $10,000.

Since we have found that a claim is stated against the County under both the 14th Amendment and § 1981 which

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[18]We are mindful that some courts have in effect ignored the $10,000 jurisdiction requisite in cases involving claims of violation of constitutional rights. These courts seem to hold that constitutional rights are so precious that, by definition, they are in every case worth more than $10,000. *See e.g. Spock v. David*, 469 F.2d 1047 (3d Cir. 1972)., *reargued*, 502 F.2d 953 (3d Cir. 1974), *reversed on other grounds sub nom. Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D.Cal. 1972); *West End Neighborhood Corp. v. Stans*, 312 F.Supp. 1066 (D.D.C. 1970). This view apparently stems from the separate opinion of Mr. Justice Stone in *Hague v. C.I.O.*, 307 U.S. 496, 529, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). There is substantial contra authority. *See e.g. Goldsmith v. Sutherland*, 426 F.2d 1395 (6th Cir.) *cert. denied*, 400 U.S. 960, 91 S.Ct. 353, 27 L.Ed.2d 270 (1970); *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001, 85 S.Ct. 718, 13 L.Ed.2d 702 (1965). In the absence of any decision on the point from out Circuit we decline to follow the cases first-above cited which find the amount in controversy invariably present because constitutional rights are not capable of valuation in monetary terms. For a full discussion of the entire problem, see the footnote in *Gomez v. Wilson*, 155 U.S.App.D.C. 242, 477 F.2d 411, 420 n.56 (1973).

is cognizable in a district court, and that the jurisdictional amount in controversy exists, we find jurisdiction against the County is granted to us under § 1331(a).[19]

III.

THE MERITS

In three recent cases the Supreme Court has invalidated state statutes or regulations requiring citizenship as a condition of obtaining public employment or licenses.[20] In *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973) the Court struck down a provision of the New York Civil Service Law which required citizenship for appointment to any position in the state's classified civil service. There were four named plaintiffs, all permanent legal resident aliens, who sued for themselves and for a class. Two of the plaintiffs were clerk-typists, one was a human resources technician, and the fourth and administrative assistant.

The Court's opinion emphasized the overbroad and indiscriminate nature of the statute, i.e. that the class of positions for which citizenship was required "reached

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[19]We also note, *sua sponte*, that jurisdiction of the claim against the County may also exist under another jurisdictional statute, 28 U.S.C. § 1343(4).

Section 1343(4) is a grant to the district courts of original jurisdiction in any civil action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." Section 1343(4) is not broad enough to cover a charge of direct violation of the 14th Amendment since the section is limited to civil actions arising "under any Act of Congress". But since we hold that the County is amenable to suit in a § 1981 action, § 1343(4) would give us jurisdiction and without respect to the amount in controversy. *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974), *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

[20]See also the summary affirmance by the Supreme Court in *Lefkowitz v. C.D.R. Enterprises, Ltd.*, ... U.S. .... , 97 S.Ct. 721, 50 L.Ed.2d 742 (1977), *aff'g C.D.R. Enterprises, Ltd. v. Board of Education of City of New York*, 412 F.Supp. 1164 (E.D.N.Y. 1976) (three-judge).

. . . positions in nearly the full range of work tasks, . . . all the way from the menial to the policy making." *Id.* at 640, 93 S.Ct. at 2846. The opinion noted that citizenship was not required for the unclassified civil service within which many of the higher policy making decisions were included. The Court categorically rejected the claim that a state can confine public jobs, paid for by public resources, to citizens of the country. While observing that each state had the power to prescribe the qualifications of voters, elective office holders and holders of "important nonelective executive, legislative and judicial positions . . . [and] officers who participated directly in the formulation, execution, or review of broad public policy . . .," the Court emphasized that such a statute must be "narrowly confined". *Id.* at 647, 93 S.Ct. at 2850. In a provocative and much discussed passage the Court said:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community,.'" *Dunn v. Blumstein*, 405 U.S. 330, 344 [92 S.Ct. 995, 1004, 31 L.Ed.2d 274] (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 642-43, 93 S.Ct. at 2848.

In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), decided the same day as *Sugarman*, struck down a rule of the Connecticut court system requiring citizenship as a prerequisite for admission to the bar. Plaintiff was a long-time resident of the United States who was married to an American citizen and thus apparently entitled to remain here indefinitely. The Court rejected the argument that the

special role of the lawyer within the governmental system justified excluding aliens from the practice of law. Although a Connecticut lawyer is denominated as a "commissioner" of the Superior Court with the right to sign writs and subpoenas, acknowledge deeds, administer oaths, take depositions and command the assistance of sheriffs and constables in the exercise of his authority, the Court stressed that these duties did not involve matters of such high policy or responsibility as would authorize a state to entrust them only to citizens. As in *Sugarman*, the Court stressed the duties imposed on resident aliens, which include the same obligation to pay taxes, and serve in the Armed Forces as are imposed on citizens. It observed that while lawyers (and other state employees) are required to take an oath to support the Federal and State Constitutions, such oath is customarily administered to resident aliens inducted into the Armed Forces and is thus deemed to be consistent with citizenship in a foreign country. The Court concluded that Connecticut had failed to establish any compelling state interest in confining law practice to citizens.

In *Examining Board of Engineers v. De Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976), the Court struck down a statute of Puerto Rico restricting the issuance of licenses for the practice of civil engineering in the private sector, to U.S. Citizens. Puerto Rico was held to be "territory" within the ambit of federal civil rights and jurisdictional statutes. Among the justifications advanced by Puerto Rico for requiring citizenship was the claim that citizen engineers are more likely to be present in the community and to be financially more accountable than non-citizens, a matter of significance since engineers may be liable for malpractice for ten years under local law. Another justification offered was that by confining the privilege of practicing engineering to citizens, Puerto Rico could prevent

the uncontrolled influx of Spanish-speaking aliens into this professional field. A third justification offered was to raise the prevailing low standard of living. The Court held that these justifications, like those of New York in *Sugarman* and Connecticut in *Griffiths*, were inadequate.[21]

From these opinions of the Supreme Court we can abstract the rules of law which we must apply in judging the California statute in question here. First, the equal protection guarantee as embodied in the 14th Amendment extends to permanent resident aliens. Second, a state statute or regulation classifying citizens and noncitizens and attaching disabilities to noncitizenship, involves a 'suspect classification''. Third, any ''suspect classification'' is subject to strict judicial scrutiny; for the statute to survive the state must establish (1) that the suspect classification [alienage] serves a compelling state interest, (2) that the classification is reasonably necessary to promote that compelling state interest, and (3) that the statute be narrowly and precisely drawn so as to avoid a classification that ''sweeps too broadly''.

We now proceed to measure the California statute, which is the subject of the instant case, against these criteria.

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[21]In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), the Supreme Court held unconstitutional a Civil Service Commission regulation requiring citizenship for practically all federal civil service positions. The holding that the Civil Service Commission was without power to exclude noncitizens from such a wide range of positions is a relatively narrow one. The Court said that such power, if it exists at all, belongs only to Congress and held that the exercise of such power by the Commission violated due process. The opinion contains interesting language which hints that Congressional, or even Presidential, action requiring citizenship as a pre-requisite for federal government employment and justified as an inducement for immigrants to become citizens, might be valid. This inducement to citizenship justification has not been dealt with in any prior opinion of the Supreme Court or in any prior judicial opinion cited to us. It was not advanced in the instant case.

In relevant part, California Government Code § 103(a) provides:

> "In any instance in which . . . members of a class of public officers or employees are . . . *declared by law to be peace officers or to have the powers of peace officers,* each member of such class must meet at least the following minimum standards:
>
> (a) Be a *citizen* of the United States."
>
> (Emphasis added)

California Penal Code § 830 and various subsections thereunder provide a very long list of occupations and positions classified as peace officers or having the powers thereof. Deputy probation officers are included.[22] contains

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[22] *Under § 830.1*
sheriff
undersheriff
deputy sheriff
policeman
marshal
deputy marshal
constable
deputy constable
Under § 830.2
highway patrolmen
members of the California State Police Division
members of the California National Guard when called into active service by the Governor
members of the University of California police department
members of a state college police department
Under § 830.3
officers and special agents of the Department of Justice, Bureau of Criminal Identification and Investigation
officers and agents of the Bureau of Narcotic Enforcement
investigators in the office of a district attorney
the Director and enforcement officers of the Department of Alcoholic Beverage Control
officers and investigators of the Division of Investigation of the Department of Consumer Affairs
investigators of the Board of Medical Quality Assurance
members and deputies of the Wildlife Protection Branch, Department of Fish and Game
county fish and game wardens

the entire list which ranges all the way from important law

State Forester and employees of the Division of Forestry
voluntary fire wardens
officers and manager of compliance services of the Department of Motor Vehicles
investigators of the Department of Motor Vehicles
Secretary and Chief Investigator of the California Horse Racing Board
racetrack investigators of the California Horse Racing Board
police officers of a regional park district
state fire marshal, and deputy fire marshals members of an arson-investigating unit of a fire department.
members of a fire department of a local agency
inspectors of the Bureau of Food and Drug
park rangers
members of a community college police department
investigators of the Division of Labor Law Enforcement

Under § 830.4

security officers of the California State Police Division
Sargeant at Arms of each house of the Legislature
Baliffs of the Supreme Court and the courts of appeal
guards and messengers of the State Treasurer's Office
director and employees of the Department of Navigation and Ocean Development
the administrator of a state hospital and police officers designated by him
railroad or steamboat company policemen commissioned by the Governor
sextons and superintendents of cemeteries
other cemetery personnel designated by a cemetery authority (See Health and Safety Code § 8325)
harbor policemen
special officers of the Department of Airports of the City of Los Angeles
the chief of toll services of the Department of Transportation and his captains, lieutenants and sergeants employed on vehicular crossings
members of a security patrol of a school district
authorized federal employees engaged in enforcing applicable state or local laws on federal property
Los Angeles County security guards
airport policemen designated by the Monterey Peninsula Airport District
airport security officers at airports operated by San Francisco, Orange or San Joaquin Counties
housing authority patrol officers employed by the housing authorities of Los Angeles or Contra Costa Counties

Under § 830.5

parole officers of the Department of Corrections
placement or parole officers of the Youth Authority
probation officers
deputy probation officers

(footnote continued on following page)

enforcement positions to positions having apparently insignificant and menial duties. Included in the latter group are sextons and superintendents of a cemetery authority and other cemetery employees, inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures and messengers of the State Treasurer's Office.

The only justification advanced by the defendants in this case as a compelling state interest is the one described in *Sugarman*, the State's power to define its "political community". We read the references in *Sugarman* to the "political community" for which the State may prescribe citizenship as a requisite of office, as being confined to high policy making officers. When confronted with this reading, defendants argue that the California statute in issue is ap-

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warden, superintendent, supervisor or guards employed by the Department of Corrections any employee having custody of a ward in an institution of the Youth Authority
transportation officers of the Youth Authority
Under § 830.5a
agents of the law liaison unit of the Department of Corrections
Under § 830.6
persons deputized or appointed as a reserve or auxiliary sheriff, deputy sheriff or city policeman
In addition to the above, the following have the powers of peace officers:
Any person summoned to the aid of any uniformed police officer as in a posse comitatus (Penal Code § 830.6[b])
the director, officers and employees of the Division of Aeronautics (Pub. Util. Code § 21252) any person vested with the power of enforcing any provisions of the Agriculture Code (Agric. Code §7)
county fire wardens and assistant and deputy fire wardens (Government Code § 24008)
inspectors of the Board of Dental Examiners (Business and Professions Code § 1704)
inspectors of the Bureau of Furniture and Bedding Inspection (Business and Professions Code § 19206)
inspectors of the Bureau of Livestock Identification (Agric. Code § 20432)
mental health counselors (Welfare and Institutions Code § 6778)
officers and employees of the state park system (Public Resources Code § 5008)
sealers of the Department of Weights and Measures (Business and Professions Code § 12013)

plicable to only a "few" positions which are either "high level" or require "demanding discretional decisions in their everyday execution." We cannot agree with the defendants. It is obvious from the long list of covered positions contained in the footnote that the statute is much broader than they claim and covers many positions with much less responsible duties than they describe. The claimed "political community" justification in this case, therefore, does not support this statute any more than it supported the requirement of citizenship for the classified civil service in New York State in *Sugarman*.

But even if we assume *arguendo* that the California statute serves a compelling state interest and employs a classification reasonably necessary to promote that compelling state interest, we would have to strike it down on the ground that it is not narrowly and precisely drawn and that it "sweeps too broadly."[23]

Although the concept was not discussed in the briefs, at the argument of the case, the court and counsel discussed whether the validity of § 1031(a) should be considered as applied, i.e. as limited to the position of deputy probation officer which is the position sought by all three plaintiffs.

The prior decisions of the Supreme Court dealing with alienage, which we have discussed above, would appear to rule out consideration of the validity of this statute as applied. Those decisions stress that the scrutiny which should be afforded to such a statute must include an examination

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[23]In various constitutional and statutory provisions, California requires citizenship as a qualification for holding statewide elective office including Governor and Lieutenant Governor and for holding certain top executive positions in state government. *See e.g.* Cal.Const. art. 5, §§ 2 and 9 and Government Code §§ 241, 1001 and 1020. We express no view as to the validity of those provisions; they are not in issue here.

of whether it is too broad in its sweep, overinclusive. That is why we, as the Court did in *Sugarman*, have examined all of the types of positions for which citizenship is required. But we are also aware that in other contexts, the Supreme Court has resorted to the "as applied" technique for the announced purpose of avoiding advisory opinions and unnecessary constitutional adjudication, especially where the outer parameters of the state statute are cloudy and unadjudicated. *See, e.g., United States v. Raines*, 362 U.S. 17, 20-22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). So, out of an abundance of caution, we proceed to examine § 1031(a) as applied.

The evidence before us contains no description of the duties performed by a deputy probation officer in California. However, counsel stipulated at the argument that we may take judicial notice of those duties based on our experience as judges. It is fortunate that all three members of this court had extensive experience as state court judges in California before appointment to the federal bench.

Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts to ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions. Important as those duties are, we cannot characterize a deputy probation officer as an employee who participates "directly in the formulation, execution, or review of broad public policy

. . . ." *Sugarman, supra,* 413 U.S. at 647, 93 S.Ct. at 2850. Since a compelling state interest appears only when the requirement of citizenship is confined to positions of that type, the statute must be condemned even as applied. As in *Griffiths,* we would find that the duties of a deputy probation officer "hardly involve matters of state policy or acts as such unique responsibility as to entrust them only to citizens." 413 U.S. at 724, 93 S.Ct. at 2856. A similar approach has recently been taken in a well-reasoned opinion of a three-judge district court striking down a New York statute requiring public school teachers to be citizens. *Norwick v. Nyquist,* 417 F.Supp. 913 (S.D.N.Y. 1976). If neither lawyers nor teachers can be required to be citizens, it would seem to us an *a fortiori* proposition that citizenship cannot be required for deputy probation officers.[24]

Having held that § 1031(a) violates the equal protection clause of the 14th Amendment, it follows that the denial of employment to the plaintiffs pursuant to § 1031(a) involves a violation of 42 U.S.C. § 1981 by the County and a violation of 42 U.S.C. § 1983 by the individual defendants. The County has denied to these plaintiffs the "same right . . . to make and enforce contracts . . ." as are enjoyed by citizens (§ 1981). The individual defendants have denied these plaintiffs "under color of [a State] statute . . . [the] rights, privileges, or immunities secured by the Constitution . . . ." (§ 1983).

Our decision herein should come as no shock or surprise either to the defendants in the instant case or to other

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[24]Our opinion, in striking down § 1031(a) on its face and as applied, should not be read as holding that California could not constitutionally enact a citizenship requirement for a narrowly confined class of the most important peace officers. We do not decide, for example, whether county sheriffs or city police chiefs are within the state's "political community" or whether a citizenship requirement for them would be reasonably necessary to promote such a compelling state interest.

California officials. Since no California court has passed upon the constitutionality of Government Code § 1301(a) up to this time the officials of Los Angeles County have apparently felt constrained to observe its requirements. But the California Attorney General seven years ago declared it to be unconstitutional[25] His opinion appears correctly to have anticipated the Supreme Court's *Sugarman* decision. Additionally, the California Supreme Court in 1969 struck down a statute prohibiting the employment of aliens on public works[26] and, even before the Supreme Court spoke in *Griffiths*, invalidated a citizenship requirement for the practice of law.[27] And the California legislature, in 1970, repealed a blanket statute which required that every employee of the state and every county or city therein must be a citizen.[28] So the direction of the tide has been clear. One need not have qualified as a soothsayer to have predicted our present holding.[29]

Since we have declared § 1031(a) to be unconstitutional because it discriminates illegally on the basis of alienage the claims of plaintiffs involving the right to travel and intrusion on Congress' immigration powers are rendered moot. We decline to discuss or decide those claims.

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[25]53 Cal.Atty.Gen.Opin. 63 (1970).

[26]*Purdy & Fitzpatrick v. State*, 71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969) (invalidating Labor Code § 1850).

[27]*Raffaelli v. Committee of Bar Examiners*, 7 Cal.3d 288, 101 Cal.Rptr. 896, 496 P.2d 1264 (1972).

[28]*See* Historical Note preceding California labor Code § 1960.

[29]It would have been preferable, in the interests of harmonious federal-state relationships, for plaintiffs to have sought relief in the state courts instead of mounting their initial challenge in the federal courts. In the lights of the above-mentioned California decisions and Attorney General's opinion, it appears that a 14th Amendment challenge in the state courts might well have succeeded. However, in our view, plaintiffs' bypass of state court remedies, for whatever reason, does not warrant abstention on our part.

IV.
RELIEF

If the statute is declared unconstitutional, defendants do not appear to dispute the specific relief sought by the various plaintiffs except as to damages and attorneys fees.

All three plaintiffs seek a declaratory judgment that Government Code § 1031(a) is unconstitutional and an injunction preventing its enforcement against them. Such declaratory judgment and injunction shall issue. The judgment will run against all defendants and will bind the successors in office of the individual defendants.

As to Plaintiff Chavez-Salido, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer II—Spanish Speaking, with seniority rights retroactive to September, 1975. As to Plaintiff Ybarra, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer I with seniority benefits retroactive to January, 1976. The judgment will further order his restoration to the eligibility list for Deputy Probation Officer II—Spanish-Speaking, retroactive to November, 1975.

As to Plaintiff Bohorquez, the judgment will contain an order directing defendants to invalidate the results of the examination for Deputy Probation Officer II—Spanish Speaking, which he took in May, 1975 and requiring them immediately to give him another test. Should Bohorquez pass the new test, the judgment will order him restored to the eligibility list for that position retroactive to May, 1975.

We pass now to the issue of damages. Plaintiffs have formally renounced any intention to seek a damage award

against any individual defendant[30] Thus the court is not required to consider certain difficult questions of governmental employee immunity which would arise if money damages were sought against the individuals.

However, plaintiffs do press their claim for money damages against the County. It is settled that a county is not clothed with the immunity from money damage awards enjoyed by a state under the 11th Amendment, unless the county's damage obligation would be paid out of the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The County makes no showing that if damages are awarded against it, they must be paid from state funds. Thus, the County is not immune. But whether damages should be awarded against the County under the facts of this case is a matter that we, as a three-judge court, decline to decide at this point.

The parties have neither briefed nor argued for us a number of questions related to a possible damage award against the County. These include (1) whether damages are compelled or discretionary, (2) if discretionary, what factors should be considered in exercising that discretion, and (3) the measure of damages, including whether there should be an offset by way of mitigation for sums earned in other employment. We therefore refer the matter of damages to the single judge to whom the case was originally assigned for further consideration by him. He will have authority to enter any further judgment on the issue which he deems appropriate. One difficult question to be considered by the single judge is whether damages should be awarded at all where the act complained of as being illegal was the County's observance of the clear and unequivocal mandate

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[30]See the stipulation of counsel filed Jan. 13, 1976 which renounces both damages and attorneys fees as against the individual defendants.

of a state statute which had not been declared unconstitutional by any court.

The plaintiffs also seek attorneys fees, but only against the County. At the time of the filing of this action and its trial, it appeared that attorneys fees were not awardable in civil rights damage actions except where specific authority to award them was contained in the applicable statute. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). And, there was no specific statutory authority for fees which applied to our case. However, after the argument, a new statute on the subject became effective which authorizes disretionary awards of attorneys fees to the prevailing party in certain civil rights matters. The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.No. 94-559, 90 Stat. 2641. The new Act is not expressly applicable to cases pending on the date of its enactment, but a recent action of the Supreme Court indicates that it may well be,[31] and a recent district court decision so holds.[32]

It is therefore appropriate for us also to refer the attorneys fees question to the single judge to whom the case was originally assigned, with authority to decide it.

This opinion will constitute this court's findings of fact and conclusions of law as to the issues herein decided and the partial judgment herein ordered. Counsel for plaintiffs will prepare and submit a partial judgment within ten days. Defense counsel, if the proposed partial judgment is not approved by him as to form, will have ten days further in which to file written objections which will not change the

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[31]See the summary disposition in *Stanton v. Bond*, ... U.S. ...., 97 S.Ct. 479, 50 L.Ed.2d 581 (1976).

[32]*Wade v. Mississippi Cooperative Extension Service*, 424 F.Supp. 1242 (N.D. 1976).

result. The single district judge to whom the case was assigned, after deciding the unresolved questions referred to him herein, may sign and file a final judgment in the case.

ADDENDUM TO OPINION

Following the filing of our Opinion on February 3, 1977, we became aware for the first time of an *en banc* decision of our Circuit in *Sethy v. Alameda Co. Water District*, 545 F.2d 1157 (9th Cir. 1976). It was published in Federal Reporter (2d Series) after our Opinion was filed. In *Sethy*, the Circuit appears to overrule *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) and explicitly holds that a municipal subdivision may be sued under § 1981. Our Opinion is in accord with the *Sethy* decision and *Sethy* in no way affects either the rationale or the result we reached herein.

Partial Judgment.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, v. Clarence E. Cabell, etc., et al., Defendants. No. CV 76-0541-IH.

This cause having been tried and argued before this Court on August 20, 1976, plaintiffs appearing by and through counsel Michele Washington and Richard A. Paez and defendants appearing by and through counsel John H. Larson, County Counsel, and Philip H. Hickok, Deputy County Counsel, the matter having been submitted for decision, and the Court having made findings of fact and conclusions of law in its Opinion of February 3, 1977.

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED:

1. Partial Judgment shall be entered on behalf of plaintiffs and against defendants; with plaintiffs Chavez-Salido, Bohorquez and Ybarra having relief as follows:

(a) It is declared that California Government Code §1031(a), on its face, and as applied is violative of the Fourteenth Amendment to the United States Constitution in that said statute denies plaintiffs equal protection of the laws and is therefore void and unenforceable.

(b) It is further declared that the actions of defendant County of Los Angeles by and through its employees in denying plaintiffs employment solely because of their alien status was and is violative of 42 U.S.C. §1981.

(c) It is further declared that the actions of the individual defendants and their successors in office in denying plaintiffs employment solely because of their alien status was and is violative of 42 U.S.C. §1983.

(d) Defendant County of Los Angeles and the individual defendants and their successors in office, agents, assigns, employees, and all of the persons under their supervision are hereby permanently enjoined from enforcing and/or applying California Government Code §1031(a) against plaintiffs.

(e) It is further ordered that immediately upon entry of this judgment, defendant County of Los Angeles and the individual defendants, shall appoint plaintiff Chavez-Salido to the position of Deputy Probation Officer II—Spanish-Speaking with all seniority benefits retroactive to September, 1975.

(f) It is further ordered that immediately upon entry of this judgment, defendant County of Los Angeles and the individual defendants, shall appoint plaintiff Pedro Luis Ybarra to the position of Deputy Probation Officer I with seniority benefits retroactive to January, 1976. It is further ordered that plaintiff Pedro Luis Ybarra shall be restored to the eligibility list for Deputy Probation Officer II—Spanish-Speaking retroactive to November, 1975.

(g) It is further ordered that immediately upon entry of this judgment, defendant County of Los Angeles and the individual defendants shall invalidate the results of the examination for Deputy Probation Officer II—Spanish-Speaking, which plaintiff Ricardo Bohorquez took in May, 1975 and immediately give plaintiff Bohorquez another test. Should plaintiff Bohorquez pass the new test, defendant County of Los Angeles and the individual defendants shall restore his name to the eligibility list for the position of Deputy Probation Officer II—Spanish-Speaking, retroactive to May, 1975.

2. The County of Los Angeles, and the individual defendants and their successors in office, agents, assigns, employees and all persons under their supervision, shall, no

later than 30 days from the date of entry of this partial judgment, submit to the Court, with a copy to counsel for plaintiffs, report detailing the actions taken in compliance with the Opinion and Order of this Court.

3. The request for damages in the form of sick pay by plaintiffs Joe Chavez-Salido and Pedro Louis Ybarra is referred to District Court Judge Irving Hill. Judge Hill shall have the authority to enter any further orders and judgment on the issue of damages as he deems just and proper in accordance with the Court's Opinion.

4. The issue of whether attorneys' fees may be awarded against the County of Los Angeles is also referred to District Court Judge Hill. He shall have authority to determine whether plaintiffs are entitled to attorneys' fees, and if so, the amount of any such award.

5. Upon his determination of the remaining issues referred to in paragraphs 3 and 4 hereof, Judge Hill may himself sign and enter a final judgment in this case.

6. The District Court Judge to whom this cause was originally assigned shall retain jurisdiction over this matter until such time as defendants are fully complied with paragraph 1 of this judgment and until the issues specified in paragraphs ... and 4 of this judgment have been finally resolved.

7. Plaintiffs shall be awarded their costs of suit in the amount of _____, except that an award of attorneys' fees, if any, shall be made pursuant to paragraph 4 of this judgment.

8. There is no just reason to delay entry of this partial judgment against the defendants and it is hereby directed that it be so entered.

IT IS SO ORDERED.

DATED: February 23, 1977.

/s/ Stanley N. Barnes
STANLEY N. BARNES
Senior Circuit Judge

/s/ Jessie W. Curtis
JESSIE W. CURTIS
Senior District Judge

/s/ Irving Hill
IRVING HILL
District Judge

Civil Minutes — General.

United States District Court, Central District of California.

Case No.: CV 76-541-IH.

Date: 7/6/78.

Title: Jose Chavez-Salido, et al v. Clarence E. Cabell, et al.

DOCKET ENTRY Ord mandate from Supreme Crt fld & spread. Pltf's req for fur dis on issue of duties, etc. denied. Pltf's are relieved from prior agreement abjuring liability against deft County under Sec. 1983. Crt ords all prcdgs stayed pending decision by Supreme Crt in *Norwick v. Nyquist*. Deft's oral mtn to dismiss comp denied. Cnsl agree m.o. will suffice. (IH)

Present: Hon. Irving Hill, Judge; C. R. Kimzey, Deputy Clerk; Don Cram, Court Reporter.

Attorneys Present for Plaintiffs: Richard A. Paez.

Attorneys Present for Defendants: Philip H. Hickoc, Deputy County Counsel.

Proceedings: (Status Conference in chambers)

Court announces that purpose of meeting is to discuss future of the case and especially the nature and scope of future proceedings, if any, in the light of the Supreme Court's order of vacation and remand. Court hears proposals and position of counsel. Court denies Plaintiffs' request for further discovery on the issue of the duties and responsibilities of Deputy County Probation Officers, pointing out that case has already been tried on stipulated facts. Court finds no good cause is shown for taking additional evidence. Court's rulings in this regard are without prejudice to either side's advancing for consideration of the Court further material believed to be judicially noticeable which bears on

the matter of duties and responsibilities of Deputy County Probation Officers.

Counsel stipulate that in view of the decision of the Supreme Court in the *Monell* case, Plaintiffs are relieved of their prior stipulation abjuring any liability against the County under §1983. The Court states that no amendment of the complaint is necessary in this regard since liability is already asserted against the County in the existing complaint. The Court, therefore, now has before it the possibility of finding the County liable under §1983 which new issue shall be briefed whenever there is a re-briefing of the entire case.

Counsel agree and the Court orders that all proceedings in the instant case shall be stayed pending decision of the United States Supreme Court in *Norwick v. Nyquist* in which certiorari has been granted, with argument set for next fall. Counsel are ordered to notify the Court when the decision of that case is in hand so that a further hearing and discussion by the Court and counsel may be had.

Defendants' contention that entire case is moot in view of the present employment status of the three named Plaintiffs, is heard by the Court and denied.

Counsel point out to the Court that an appeal to the Ninth Circuit of the portions of the judgment dealing with damages and attorneys fees is now pending and has not been directly affected by the Supreme Court's vacation and remand order. Court suggests that Ninth Circuit be informed of today's proceeding and asked to stay its appeal pending a new and final judgment by this Court or in the alternative, that this Court on stipulation vacate the damage and attorneys fee award for reconsideration at the time the case is again argued on the merits in this Court. Counsel will discuss these

alternatives and inform the Court of how they propose to proceed.

Without objection from counsel, Court orders Supreme Court mandate filed and spread. Counsel stipulate that a minute order concerning these proceedings this day will be sufficient.

Opinion.

Chavez-Salido v. Cabell, U.S. District Court, Central District of California.

CHAVEZ-SALIDO, et al. v. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., and the COUNTY OF LOS ANGELES, No. CV 76-0541-IH, June 4, 1980.

Full Text of Opinion.

HILL, Chief Judge: — In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977), this Court declared unconstitutional California Government Code Section 1031(a). That section provides that one must be a citizen of the United States to be a peace officer or to occupy any governmental position, state, county or local, which is declared by law to have the powers of a peace officer. Plaintiffs in the case are three non-citizens, each of whom sought employment by Defendant Los Angeles County as a Deputy Probation Officer II and was refused employment solely because of the citizenship requirement of the statute.

This Court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, the judgment of this Court was vacated and the case was remanded to this Court "for further consideration in light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and was reargued on December 8, 1979.

The facts are fully set forth in the original opinion of this Court and do not need repetition here. We likewise will not repeat herein the jurisdictional discussion of the original

opinion, which we readopt.[1] In the footnote[2] we discuss the few inconsequential factual changes occurring since the original opinion was filed.

We recognize that the views of the Supreme Court with respect to the general problem of citizenship being required for employment by state and local government agencies, have been much more fully developed and expounded in two recent cases: Foley v. Connelie, supra and Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979).[3]

Applying the newly developed principles enunciated in Foley and Ambach, we have reached the same result as we reached before. We again hold that Section 1031(a) is unconstitutional. We reach this same result on the same

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[1]At the second argument, counsel for Plaintiffs asked to be relieved of their prior action in which they voluntarily waived any claim against the County under 42 U.S.C. Section 1983. They point to the intervening opinion of the Supreme Court in Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 17 FEP Cases 873 (1978), as having changed the previous law. As we understand their papers, defendants do not dispute the County's Section 1983 liability under Monell. At this late date, we decline to relieve counsel of their previous waiver, noting that under our previous holding the County is amenable to suit under Section 1981 and that a Section 1983 remedy would be cumulative at best.

[2]As to the functions and powers of probation officers, the parties stipulated that probation officers in California are not authorized to carry weapons. In addition, this Court took judicial notice of certain sections of California law defining the powers and functions of probation officers, which sections were not mentioned in the previous opinion. i.e., Code of Civil Procedure Section 131.3 et seq.; Penal Code Section 1203 et seq.; Welfare and Institutions Code Section 280-83, 727 et seq. We do not regard any of these sections as working any material change in the description of the duties of probation officers as contained in the original opinion.

The Court was also informed that since the publication of its original opinion, Plaintiff Chavez-Salido has left County employment altogether and no longer seeks injunctive relief with reference to appointment. However, his case is not rendered moot by that fact since his prayers for back pay and attorneys fees remain viable.

[3]The Supreme Court has also spoken on the same subject in Nyquist v. Mauclet, 432 U.S. 1 (1977), but we do not regard that opinion as of importance for our purposes.

grounds as before: 1) the statute is overbroad and 2) the statute as applied denies these plaintiffs the equal protection of the law.

I.
OVERBREADTH

In our original opinion, we discussed the status of alienage under the equal protection clause as enunciated by the Supreme Court. We believe that discussion remains valid today. Nothing in the intervening opinions of the Supreme Court would in our view undermine the proposition that citizenship may be required for governmental employment only by a statute which is "narrowly drawn" and which does not sweep "too broadly."

Footnote 5 of the Foley opinion, 435 U.S. at 296, 17 FEP Cases at 3, reaffirms the continued validity of the overbreadth criterion in the following language:

> "This is not to say, of course, that a State may accomplish this end with a citizenship restriction that 'sweeps indiscriminately', [citing Sugarman] without regard for the differences in the positions involved."

In Foley, the Statute requiring citizenship was narrowly drawn. It applied only to members of the New York State Police Force, "State Troopers." In Norwick the statute was likewise narrowly drawn. It applied only to persons who are employed "to teach in the public schools" of the state. It is noteworthy that the New York statute involved in Norwick did not confine employment as teachers to those who had their citizenship, but permitted the employment of non-citizens who had "made application" to become citizens. The California statute with which we deal permits the employment only of persons who are already citizens and, as we pointed out in our original opinion, covers a whole host

of other occupations to which the requirement of citizenship cannot be reasonably related.

We read the new decisions of the Supreme Court as continuing to emphasize that the legislature must make a reasoned judgment as to each occupation in the field of public employment for which it requires citizenship as a prerequisite. The Court's opinions seem to require that the legislature should examine the functions, duties and responsibilities of various public jobs, position by position, and determine for each that the job is so necessarily involved with the essential power of government that it should be confined to citizens.

[CALIFORNIA ENACTMENTS]

If these are the requirements, the legislative action of the California legislature with which we are concerned does not meet them. The California legislature has for over one hundred twenty five years dealt with the subject of who is a peace officer and who, additionally, is deemed to have the powers of a peace officer. The first enactments in this field appear to go back to 1851.[4] In dozens of subsequent enactments, the legislature had added one or more public positions to the list. Until 1961, all the repeated additions to the list of peace officers were enacted without any requirement that people holding these positions should be citizens.[5] Then in 1961, in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement to all of the positions on

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[4]See Hetherington v. Cal. State Personnel Board, 82 Cal.App.3d 582, 172 Cal. Rptr. 300, 309 (1978) (Reynoso J., dissenting). Originally, only four positions were granted peace officer status: sheriff, policeman, marshal, and constable. Id.

[5]We note that the California Attorney General found no pre-1961 citizenship requirements for peace officers in his study of this matter. See Opinion No. 69-199, 53 A.G.Op. 63, 68 (1970).

the list. We are cited no legislative history or legislative findings which supply any basis or rationale for this broad new citizenship requirement.

In Footnote 22 of our prior opinion, we set forth the extensive list of positions covered by the California citizenship requirement Section 1031)a). It is to be remembered that state, county and local employees are all included if they are within any of the occupational categories on the list. We believe that Section 1031)a) is void as a law requiring citizenship which "sweeps too broadly" under the Court's original holding in Sugarman and the recent Footnote 5 in Foley. There appears to be no justification whatever for excluding aliens, even those who have applied for citizenship, from holding public employment as cemetery sextons, furniture and bedding inspectors, livestock identification inspectors and toll service employees.[6] Yet

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[6]We note that since the publication of our original opinion, the California legislature has added a substantial number of other positions to the list appearing as Footnote 22 of the original opinion and has deleted a few positions from that list. In the interest of accuracy, the changes are hereinafter specified:

Under Section 830.1
Add: Inspectors and Investigators in Offices of District Attorney

Under Section 830.2
Add: Bay Area Rapid Transit District Officers

Under Section 830.3
Add: Narcotics agents of the Department of Justice
Add: Investigators of the State Department of Health
Delete: District Attorney investigators
Delete: "members of a fire department"

under Section 830.31
Add: Marshals and police appointed by the Director of Parks and Recreation

Under Section 830.35
Add: Policemen of the San Francisco Port Commission

Under Section 830.36
Add: Police officers appointed by the Bethel Island Municipal Improvement District

Under Section 830.4
Add: Airport security officers of the City of Palm Springs
Add: Transit police officers of the Southern California Rapid Transit District

all these are within the proscription of Section 1031)a) along with probation officers.

As will be discussed more fully in part II, infra, certain positions within the "political community" are subject to a less stringent equal protection scrutiny than those positions not within the "political community". For the purposes of this overbreadth analysis, it suffices to say that cemetery sextons, toll collectors, and persons in many other occupations within Section 1031(a) cannot be considered members of the political community no matter how liberally that category is viewed.

Thus, nothing has changed which would alter our original conclusion: Section 1031(a) is grossly overbroad and sweeps much too broadly in its proscription of alien employment.

Under Section 830.10
Add: County coroners and deputy coroners
Under Section 830.11
Add: Welfare fraud investigators or inspectors, of designated by local ordinance
Under powers of peace officers:
Delete: the Director, officers and employees of the Division of Aeronautics (Public Utilities Code Section 21252)
Delete: Any person vested with the power of enforcing any provisions of the Agriculture Code (Agriculture Code [now Food & Agriculture Code] Section 7)
Delete: Inspectors of the Bureau of Livestock Identification (Agriculture Code [now Food & Agriculture Code] Section 24032)
Delete: Officers and employees of the state part system (Public Resources Code Section 5007)
Delete: Sealers of the Department of Weights and Measures (Business and Professions Code Section 12013).

II.

THE STATUTE AS APPLIED

In their rebriefing and reargument, defendants again urge us to restrict our examination only to the validity of the statute as applied to deputy probation officers.[7] Defendants have pointed to nothing in the recent opinions of the Supreme Court which would justify such a limited examination. So we again observe that the decisions of the Supreme Court appear to rule out consideration of such a statute as applied. We again determine that the scrutiny to be afforded a statute of this kind must include an examination of whether it is too broad in its scope. This is the approach which the Supreme Court itself undertook in Sugarman, and, as indicated by the footnote in Foley, remains the proper approach to this day. But, out of an abundance of caution, we have again proceeded to examine Section 1031(a) as applied. We again hold the statute to be unconstitutional as applied to deputy probation officers as their functions and powers are defined in California law.

This examination of the statute as applied requires us to determine whether deputy probation officers fall within the group of public service positions which the states and local governments may reserve for American citizens. That group of positions was originally described in Sugarman as involving "members of the political community". The

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[7]Defendants at the reargument made a contention not previously advanced by them, i.e., that these plaintiffs are confined to challenging the validity of Section 1031(a) only as it applies to probation officers, and have no standing to challenge the validity of the statute as it applies to other occupations. We reject this contention. Under standard equal protection analyses, and under the explicit approach of the Supreme Court in Sugarman, where there is a suspect classification, i.e., noncitizens, anyone affected by the statute would appear to have standing to challenge the statute on overbreadth grounds. This argument is really no different from that defendants made with respect to overbreadth, and we reject it for the same reasons as found in that section of our opinion.

characteristics of positions which fall within the group have been more fully expounded in Norwick and Foley.

[NORWICK CASE]

In Norwick, which held that school teachers are within the political community, the Court appears to rest the decision upon the important policy and governmental functions which public school teachers perform. The Court specifically relied on the importance of public education in our society, 441 U.S. at 76-78, and noted that the function of a schoolteacher is of paramount importance because it includes promoting civil virtues, serving as a role model and influencing the students' attitudes towards government and the political process, id. at 78-80.

We find no difficulty in holding that the function of deputy probation officers is substantially distinguishable. Probation officers do not deal with the bulk of the community. They perform none of the school teaching functions with respect either to children or adults. The relationship of probation officers to those under their supervision is far different from the relationship of a public school teacher to his pupils. The effect of probation officers on the governmental and political process is, we believe, far, far less.

In Foley the Court held that New York State Troopers were within the political community. The underlying reason was expressed as follows:

> "[I]t is because this country entrusts many of its most important responsibilities to these officers . . . [I]t represents the choice, and right, of the people to be governed by their citizen peers. To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially

affects members of the political community." 435 U.S. at 296, 17 FEP Cases at 3.

The role of the State Troopers was also described in Foley as one involving "a very high degree of judgment and discretion, the abuse and misuse of which can have serious impact on individuals," 435 U.S. at 298, and as a person who is "vested with . . . plenary discretionary powers." Id.

Both State Troopers and deputy probation officers are generally regarded as being part of the law enforcement apparatus of the community. We have carefully compared the powers and duties of both with particular reference to the above quoted language. In so doing, we have, as required by the teachings of the Supreme Court, given great weight and respect to the determination of the state legislature in requiring citizenship as a condition of employment. But we have nevertheless concluded that the positions are vastly different and that a constitutionally permissible basis does not exist for such a citizenship requirement for deputy probation officers.

The Foley opinion, in describing the role of the State Trooper, emphasizes that he is involved in formulating and executing broad public policy, that he deals with the whole community, and that his actions immediately affect the lives of citizens in all walks of life. It also emphasizes that he is "clothed with authority to exercise an almost infinite variety of discretionary powers." 435 U.S. at 297.

We contrast this with the role of a probation officer in California. In the original opinion we described the probation officer's powers and duties in the following language:

> "Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts

to ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions."

For the purposes of this remand, we have given even more careful and detailed consideration to those powers and duties.

No single section of California law spells out in detail all or substantially all of the duties of a probation officer. Bits and pieces of his powers are found in a number of statutes. Some of them may be thought to involve wide and important discretion and authority. For example, a probation officer may arrest a probationer believed to have violated the terms of his probation for the purpose of bringing the probationer before a court. The Court may thereafter, in its discretion, issue a warrant permitting further detention. Penal Code Section 1203.2(a). This limited power of arrest contrasts sharply with the general powers of arrest possessed by State Troopers and even ordinary policemen.

With respect to juveniles, a probation officer, under California Welfare and Institutions Code Section 628, acts as the custodian of a juvenile taken into custody by the police. After making an investigation, the probation officer has the discretion either to release the juvenile to his parents or retain him in custody. The custody will be only for a very short period pending a court hearing. The essential decision

on the subject of custody is thus a judicial one in which the probation officer is but an advisor to the court.[8]

In Foley the Court described State Troopers as exercising the functions traditionally associated with peace officers, i.e. the prevention and detection of crime, apprehension of suspected criminals, execution of warrants, search and siezure for arrest, and the carrying of weapons, 435 U.S. at 293. A California probation officer cannot be said to perform any of those functions except perhaps a limited power of arrest.

Whereas California law gives policemen the many powers mentioned above (Penal Code Section 830.1), the section which confers the status of peace officers on California probation officers (Penal Code Section 830.5) contains words of extreme limitation on the powers of the latter. We read the relevant sections of the Penal Code as allowing a probation officer to act like a policeman only in enforcing compliance by a probationer of the conditions of his pro-

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[8]The Supreme Court has recently considered the role of a California probation officer in the Fare v. Michael C. 442 U.S. 707 (1979). In that case the question before the Court concerned a minor who, during interrogation by the police, had asked to see a probation officer who had supervised him in other juvenile court problems. No meeting with the probation officer was arranged and the interrogation continued. In the interrogation, the juvenile made damaging admissions which he sought to suppress from the juvenile court proceedings on the ground that the Miranda rule had been violated. The California Supreme Court had upheld the juvenile's contention and likened the function of a probation officer to that of an attorney; a request to see an attorney would require an end to all questioning. The Supreme Court reversed, pointing out that a probation officer has no specialized legal training and has a duty of loyalty to the state, under which he could not withhold, from the police or the courts, facts made known to him by the juvenile as to a crime then under investigation. The undisputed existence of a probation officer's duties to the state for this purpose does not in our view make the probation officer the equivalent of a policeman. The opinion of the Court was directed to matters other than the governmental function exception in the field of alienage with which we are dealing in this case.

bation and in the transportation of a probationer.[9] Moreover, as we point out in Footnote 1, supra, the California legislature does not allow probation officers to carry weapons, which right is indispensable to the function of State Troopers, policemen, and others truly having the powers of a peace officer.

When the functions and powers of a California probation officer are compared side by side with those of a New York State Trooper or any other policeman, the differences are noteworthy. The probation officer's position involves some discretion to be sure, but the discretion is far less important than the policeman's since the probation officer's decisions lack finality and are made advisory to and under the supervision of a judicial officer.

Thus, a probation officer's duties involve substantially less discretion and responsibility than either a schoolteacher's or a policeman's. Just as important is the impact of each employee on the public at large. Public schoolteachers see a great majority of children and are with them many hours of each day through their formative years. Policeman deal with the entire community. Probation officers, on the other hand, deal only with a limited number of persons who have had prior adverse contact with the judicial system. Thus, in terms of the breadth of their constituency and the width of the group they serve, there is in our view a vast distinction between public schoolteachers and

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[9]Section 830.5 encompasses the recognition of both probation officers and state parole officers as peace officers. Probation officers are appointed by the county, while parole officers are employed by the State Department of Corrections. We read Section 830.5(a)(2), authorizing action in connection with the escape of any inmate from a state institution, to be applicable to parole officers only, and we also read Section 830.5(a)(1) where it refers to parolees to be describing only the authority of parole officers. A contrary interpretation would not in any way change today's result.

policemen on the one hand and probation officers on the other.

For the reasons stated above, we hold that the position of deputy probation officer is not within the political community. Therefore, we must apply the strict scrutiny standard and determine if a compelling state interest exists. In so doing, we reach the same result as we reached in the original opinion and hold that citizenship may not be required for the position of Deputy Probation Officer.

III.

RELIEF

In view of our reaching the same result as reached in the original opinion, the relief decreed will be the same except that the injunctive relief will not be applicable to Plaintiff Chavez-Salido. See Footnote 2, supra. We note that the single judge to whom the case was originally assigned, Judge Hill, awarded attorneys fees to the Plaintiffs. We ratify that award and authorize him to award such further attorneys fees in connection with the appeal, remand, rebriefing, and reargument as he deems appropriate. We also authorize the single judge, Judge Hill, to sign and file a final judgment in the case. Counsel for Plaintiffs will prepare and submit a proposed final judgment within 10 days. If the form of the proposed final judgment is not approved by defense counsel, the latter will have 10 days further in which to file written objections which will not change the result.

Judge Pregerson concurs in this opinion.

DISSENTING OPINION.

CURTIS, Senior District Judge, dissenting: — In our first opinion filed February 3, 1977, we declared section 1031(a) of the California Government Code unconstitutional (1) as overbroad, and (2) in violation of the Equal Protection Clause as applied to the plaintiffs herein. Upon appeal, the

Supreme Court has remanded the case "for further consideration in the light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)."

I.
FACIAL OVERBREADTH CHALLENGE

Since Foley does not touch on the issue of "overbreadth", if the Supreme Court had accepted our holding on this issue, I would think it would have simply affirmed our decision, at least upon the issue of overbreadth, and that would have been the end of the matter.

But, since it did not do so, and upon remand directs our attention to the issues with which Foley was concerned and no others, I can only conclude that the Supreme Court did not agree with our holding on the issue of overbreadth.

Furthermore, it seems clear to me that plaintiffs would have no standing to challenge the statute as overbroad merely because it included categories of persons not before the court to which plaintiffs did not belong, but as to which the application of the statute might produce an unconstitutional result.

In support of my position I rely upon the Court's statement in United States v. Raines, 362 U.S. 17, 20-21 (1960):

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because

irreconcilable with the Constitution, except aas it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioner of Emigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. United States v. Wurzbach, 280 U.S. 396; Heald v. District of Columbia, 259 U.S. 114, 123; Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; Collins v. Texas, 223 U.S. 288, 295-296; New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160-161. Cf. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513; Virginia R. Co. v. System Federation. 300 U.S. 515, 558, 1 LRRM 743; Blackmer v. United States, 284 U.S. 421, 442; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 54-55; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Tyler v. Judges of the Court of Registration, 179 U.S. 405; Ashwander v. TVA, 297 U.S. 288, 347-348 (concurring opinion)."

The same rule was followed in Broadrick v. Oklahoma, 413 U.S. 601 (1973), when the Court said at 610:

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground

> that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., Austin v. The Aldermen, 7 Wall. 694, 698-699 (1869); Supervisors v. Stanley, 105 U.S. 305, 311-315 (1882); Hatch v. Reardon, 204 U.S. 152, 160-161 (1907); Yazoo & M.V.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-220 (1912); United States v. Wurzbach, supra, at 399; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513 (1937); United States v. Raines, 362 U.S. 17 (1960)."

It is true that the Court has recognized some limited exceptions to this rule, but only "because of the most 'weighty countervailing policies.' " Broadrick, supra, at 611, citing Raines, supra, at 22-23. Such exceptions have been applied in most instances to cases in which a holding of unconstitutionality on only one aspect of the statute might have an impact upon persons who are not parties to the action, and who would have no effective avenue of preserving their rights themselves. An exception perhaps most often followed is where courts have been inclined to depart to some extent from traditional rules of standing so as to permit attacks on overly broad statutes affecting speech and expression which, unless stricken in their entirety, might remain as a threat or deterrent to constitutionally protected expression.

After enumerating the exceptional situations in which the standing has been allowed, the Court said:

> "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See, Dombrowski v. Pfister, 380 U.S. at 491; Cox v. New Hampshire, 312 U.S. 569 (1941); United States v. Thirty-seven Photographs, 402

U.S. 363 (1971); cf. Breard v. Alexandria, 341 U.S. 622 (1951)."

413 U.S. at 613.

In any event, none of the exceptions pointed out in Broadrick or Raines are applicable in construing section 1031(a), and I would therefore, in reliance upon this rule, deny plaintiffs' standing in this action.

The majority bases its holding of overbreadth upon the concept that the statute "sweeps too broadly" in that it includes occupational categories as to which the application of the citizenship requirement would be clearly unconstitutional. In doing so, it relies upon Sugarman v. Dougall, 413 U.S. 634, 635, 5 FEP Cases 1152 (1973), in which the Supreme Court struck down section 53 of the New York Civil Service Law which provided, "no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." The Court in Sugarman recognized the right of the state to exclude non-citizens in occupational categories whose members participate directly in the formation and execution of government policy, but held that section 53 was so imprecisely and broadly drawn as to include "many positions with respect to which the State's proffered justification has little, if any, relationship." 413 U.S. at 642.

By way of explaining its decision, the Court said:

> "While we rule that §53 is unconstitutional, we do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a *flat ban on the employment of aliens in positions that have little, if any,*

> *relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.*
>
> . . .
>
> Neither do we hold that a State may not, in an *appropriately defined class of positions,* require citizenship as a qualification for office."

413 U.S. at 646-47, 5 FEP Cases at 1157 (emphasis added).

The California and New York statutes are clearly distinguishable. The Court found the New York statute to be overbroad because of its failure to define the occupational categories which the state legislature wished to reserve for citizens with that degree of narrowness and precision necessary in order to distinguish between those to whom the statute could be constitutionally applied from those as to whom the statute could not be so applied. The California statute, on the other hand, although it includes a great many different occupational categories, each of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer[10] could be more clearly defined.

I would hold therefore that section 103(a) of the California Government Code should be upheld as against an attack for overbreadth.

II.
VALIDITY AS APPLIED

Although the Courts have held that state classifications based on alienage are, for purposes of equal protection analysis, "inherently suspect and subject to close judicial scrutiny." (Graham v. Richardson, 403 U.S. 365, 372 (1971)),

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[10]Since the duties of a deputy probation officer are the same as a "probation officer" I make no distinction between the two in this opinion.

in Foley the Court created a significant exception where certain governmental functions are involved.

> "The individual, [upon becoming a citizen], belongs to the polity and is entitled to participate in the process of democratic decision-making. Accordingly, we have recognized 'a State's historical power to exclude aliens from participation in its democratic political institutions.' [Sugarman v. Dougall, 413 U.S. 634, 648, 5 FEP Cases 1152 (1973)], as part of the sovereign's obligation ' "to preserve the basic conception of a political community." ' 413 U.S., at 647, 5 FEP Cases at 1157.
>
> The practical consequence of this theory is that 'our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives.' [Sugarman], supra, at 648, 5 FEP Cases at 1157. The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."

435 U.S. at 295-96, 17 FEP Cases at 2-3.

In Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979), decided after Foley and subsequent to remand of the instant case, the Foley holding was further clarified. Said the Court:

> "The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."

441 U.S. at 75, 19 FEP Cases at 470.

Governmental Function Test.

After discussing the limited right of a state to require citizenship for certain positions, the Court provided the following guidelines for determining the applicability of the Foley exception to strict scrutiny analysis:

> "[W]e must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."

435 U.S. at 296, 17 FEP Cases at 3.

In Ambach, which involved a challenge to a citizenship requirement for teaching in the public schools, the Court further developed the governmental function test:

> "In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role."

441 U.S. at 75, 19 FEP Cases at 470.

Therefore, in determining whether the strict scrutiny or rational basis analysis should be applied, this court must apply the governmental function test to determine: (1) the degree of discretionary decisionmaking afforded probation officers under the system, and (2) the role of the probation system in the governmental structure.

In Foley, the Court was confronted with a New York State statute requiring New York State Troopers to be citizens. The Court upheld the statute's citizenship requirement on the ground that such a trooper was a member of the State Police Force, a law enforcement body which exercises broad police authority throughout the state. After discussing in some detail the varying duties which the police are called upon to perform, the Court states:

> "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact upon individuals."

435 U.S. at 298, 17 FEP Cases at 4.

Both the Supreme Court of the United States and the Supreme Court of the State of California have recognized the very high degree of discretion and responsibility required of a probation officer in the performance of his duties. In Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973), the Court said:

> "Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation."

In In re Wayne H., 24 Cal.3d 595, 601, 156 Cal.Rptr. 344, 596 P.2d 1 (1979)[11] the Supreme Court of the State of California, in discussing the responsibilities of a probation officer while conducting a juvenile investigation to determine whether the juvenile should be further detained, said:

> "While the purposes of such an interview are relatively restricted, however, the latitude given the probation officer in reaching a detention decision, and the effect of that decision on the minor, are substantial."

Probably the most sensitive area in which police officers and probation officers are both called upon to exercise dis-

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[11]Although the Fare v. Michael C., 442 U.S. 707 (1979) opinion places portions of the California Supreme Court's opinion in In re Wayne H. in doubt, the portion dealing with the responsibilities and discretionary powers of the probation officer are in no way affected.

cretion and judgment is in the making of arrests of individuals in appropriate cases. Any arrest by whomever made is a major intrusion upon the life of the victim and the entrusting of the power and discretion upon a public officer to make or withhold an arrest is a matter of the highest concern to the state. While it is true a police officer deals with a broad segment of the citizenry, whereas a probation officer deals with a very narrow segment of the population, an arrest by a probation officer requires no less a degree of judgment or discretion than an arrest by a police officer. Any abuse or misuse of such power by either can have just as severe an impact on the individual arrested and upon society at large.

I would find no difficulty in holding that the duties of a probation officer involves a very high degree of discretionary decisionmaking which substantially affects members of the political community.

In Ambach, the Court held that teachers pursuing their role in the public education system fulfill a most fundamental obligation of government to its constituency. 441 U.S. at 78-79. The Court further said in summary:

> "Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."

Id. at 79, 19 FEP Cases at 471 (footnote omitted).

While a teacher has both the duty and the opportunity on a day-to-day basis to work with a broad segment of school children, a probation officer through his role has the duty and the opportunity by suggestion, supervision, example, and instruction of bringing the same kind of influence to a narrow class of problem individuals, selected because of their antisocial behavior, upon whom the impact of such

influence is even more critically needed than by the normal child in the public classroom.

The majority, in distinguishing between the duties of a police officer and a teacher, on the one hand, and a probation officer, on the other, places great reliance upon the fact that policemen and school teachers exercise their discretion and responsibility in a great variety of situations and deal with large segments of the community. In my view, however, the determining factor is not the size of the arena in which the policemen or teachers exercise their judgment and discretion, or the number of times in a given period that they are called upon to exercise such judgment, nor the great variety of occasions upon which they are called to act. What is important is the weight of the impact which these judgments, when made, have upon the process of state government.

Jurors have been held so closely associated with the state's democratic political institutions that these positions may be reserved for citizens. See Perkins v. Smith. 379 F.Supp. 134 (Md. 1974), aff'd, 426 U.S. 913 (1976). Yet, a juror does not confront a broad segment of the citizenry, nor does he exercise a multitude of functions on a great number of occasions. He may only sit on one case in a lifetime, but upon this one occasion he serves such a vital part of the state's judicial function that the courts have recognized the state's right to insist that only citizens fill this role.

The probation system, and its probation officers through which it is enforced, play an integral role in the operation of the judicial system. Almost every sentence imposed by any judge upon a criminal offender is fashioned in large measure upon the recommendation of a probation officer. The impact of such recommendations upon the judicial process is only slightly less than the decision made by the judge

himself and equates favorably in importance with anything done by a police officer, a teacher or a juror in furthering the governmental function.

Application of the Rational Basis Test

In the light of the foregoing considerations, therefore, I would hold that probation officers come clearly within the "governmental function" principle recognized in Sugarman, Foley and Ambach.

It cannot be disputed that the State of California has a legitimate interest in the efficient operation of a law enforcement system in this state in which a probation officer plays an important part. Since the Constitution only requires that a citizenship requirement applicable to a probation officer bear a rational relationship to a legitimate state interest I would hold that the statute meets the rational test and should be applied.

Accordingly, I dissent.

Final Judgment.

United States District Court, Central District of California.

Jose Chavez-Salido, et al, Plaintiffs, v. County of Los Angeles, et al, Defendants. No. CV 76-0541-IH.

Filed: Aug. 15, 1980.

Entered: Aug. 19, 1980.

In this matter, an order of the Three-Judge District Court denominated "Partial Judgment" was filed on February 23, 1977. The said Partial Judgment was pursuant to an opinion of the three-judge court and was published at 427 F.Supp. 158. Pursuant to authority granted in the said Partial Judgment, District Judge Hill rendered a Final Judgment, which was filed May 27, 1977, and is unpublished. The judgment of the three-judge court of February 23, 1977, was vacated by the Supreme Court and the matter was remanded to the three-judge court for further consideration. 436 U.S. 901 (1978). The said Final Judgment of District Judge Hill was vacated and remanded by the Court of Appeals for the Ninth Circuit by an unpublished order of that court filed May 14, 1979.

Pursuant to the remand of the Supreme Court, the three-judge District Court again heard argument in the matter on December 8, 1979. Appearances before the Three-Judge District Court (and thereafter at hearings of the one-judge court) were: for Plaintiffs, Legal Aid Foundation of Los Angeles by Richard A. Paez, Esq.; for Defendants, John H. Larson, County Counsel, Los Angeles County, by Philip H. Hickok, Deputy County Counsel.

The three-judge court decided the statute in question unconstitutional in a two-judge majority opinion filed June 4, 1980, and published at .... F.Supp. .... Judge Curtis dissented. The three-judge court authorized Judge Hill to make

findings of fact and conclusions of law on the issue of damages and attorney's fees and to file a final judgment in the matter.

Argument on the matters referred to him for decision was held before Judge Hill on August 1, 1980, and he, on that date, announced findings and conclusions as to the issues referred to him. Such findings and conclusions were rendered orally. A transcript of Judge Hill's remarks on August 1, 1980, shall be filed when produced which shall constitute his said findings and conclusions.

It is appropriate that this final judgment shall now be filed, containing both the orders and judgment of the three-judge court and the orders and judgment of District Judge Hill under authority granted to him by the three-judge court. Since the orders and judgment of the three-judge court are contained in this document, it has been prepared for the signature of both Circuit Judge Pregerson and District Judge Hill, who constitute the majority of said three-judge court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED *by the Three-Judge District Court:*

1. Judgment shall be entered on behalf of Plaintiffs, Jose Chavez-Salido, Ricardo Bohorquez and Pedro Luis Ybarra, and against Defendants, relief as follows:

(a) California Government Code Sec. 1031(a), on its face and as applied to Plaintiffs, was and is in violation of the Fourteenth Amendment to the United States Constitution in that it denies Plaintiffs equal protection of the laws and it is, therefore, void and unenforceable;

(b) The actions of Defendant County of Los Angeles by and through its employees in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1981;

(c) The actions of the individual Defendants and their successors in office in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1983;

(d) Defendant County of Los Angeles and the individual Defendants and their successors in office are hereby permanently enjoined from enforcing and/or applying California Government Code Sec. 1031(a) against Plaintiffs Ricardo Bohorquez and Pedro Luis Ybarra.

2. The request for damages in the form of back pay by Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra is referred to Chief District Judge Irving Hill for resolution. Chief Judge Hill shall have the authority to enter any further orders and judgment on the issue of damages and other appropriate relief as he deems just and proper in accordance with the three-judge court opinions of February 3, 1977, and June 4, 1980.

3. Plaintiffs' request for attorneys' fees pursuant to 42 U.S.C. Sec. 1988 is also referred for determination to Chief District Judge Irving Hill. He shall have authority to award attorneys' fees in connection with the judgment previously entered in this action, the appeal, remand and rebriefing, and reargument, as he deems appropriate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by *District Judge Irving Hill* under authority granted by the three-judge court:

4. Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra shall, in addition to the relief granted to them by the three-judge court, recover damages as follows:

(a) Plaintiff Jose Chavez-Salido is awarded damages in the amount of $10,526.47 against Defendant County of Los Angeles;

(b) Plaintiff Pedro Ybarra is awarded damages in the amount of $8,521,42 against Defendant County of Los Angeles.

5. Plaintiff Ricardo Bohorquez is denied damages. However, Defendant County of Los Angeles shall restore Plaintiff Bohorquez to the eligibility list of Deputy Probation Officer II — Spanish-speaking with a score of 90.

6. Pursuant to the provisions of the Civil Rights Attorney's Fees Award Act of 1976, Pub.Law 94-559, 42 U.S.C. Sec. 1988, Plaintiffs' counsel are awarded reasonable attorneys' fees in the amount of $24,572. Said fees shall be paid by Defendant County of Los Angeles.

7. Interest, at the rate of 7% per annum, shall be paid on the award of attorneys' fees and damages from August 4, 1980.

8. The Court shall reserve jurisdiction over this action to allow Plaintiffs' counsel, if appropriate, to move the Court for an award of additional attorneys' fees for time expended on any appeal from this Judgment.

DATED: August 4, 1980.

/s/ HARRY PREGERSON
Harry Pregerson, Judge
U.S. Court of Appeals, 9th Circuit

/s/ IRVING HILL
Irving Hill, Judge
United States District Court

Government Code § 1031. Public Officers or Employees Having Powers of Peace Officers; Minimum Standards.

Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:

(a) Be a citizen of the United States;

(b) Be at least 18 years of age;

(c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose any criminal record;

(d) Be of good moral character, as determined by a thorough background investigation;

(e) Be a high school graduate or pass the general education development test indicating high school graduation level; provided that this subdivision shall not apply to any public officer or employee who was employed, prior to the effective date of the amendment of this section made at the 1971 Regular Session of the Legislature, in any position declared by law prior to the effective date of such amendment to be peace officer positions;

(f) Be found, after examination by a licensed physician and surgeon, to be free from any physical, emotional, or mental condition which might adversely affect his exercise of the powers of a peace officer.

This section shall not be construed to preclude the adoption of additional or higher standards, including age.

§ 830.5 Correctional, parole and probation officers.

(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, *probation officer, or deputy probation officer is a peace officer*. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only as to conditions of parole or of probation by any person in this state on parole or probation, or to the escape of any inmate or ward from a state institution, or to the transportation of such persons. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment. (emphasis added).

§ 131.4 Probation officer and deputies; performance of duties; powers over probationers; courts served by officers

Any of the duties of the probation officer may be performed by a deputy probation officer and shall be performed by him whenever detailed to perform the same by the probation officer; and it shall be the duty of the probation officer to see that the deputy probation officer performs his duties.

Such probation officer and each deputy probation officer shall have, as to the person so committed to the care of such probation officer or deputy probation officer, the powers of a peace officer.

The probation officers and deputy probation officers appointed under section 131.2 of this code shall serve as such probation officers in all courts having original jurisdiction of criminal actions in this State. (Added by Stats. 1939, c. 1093, § 5.)